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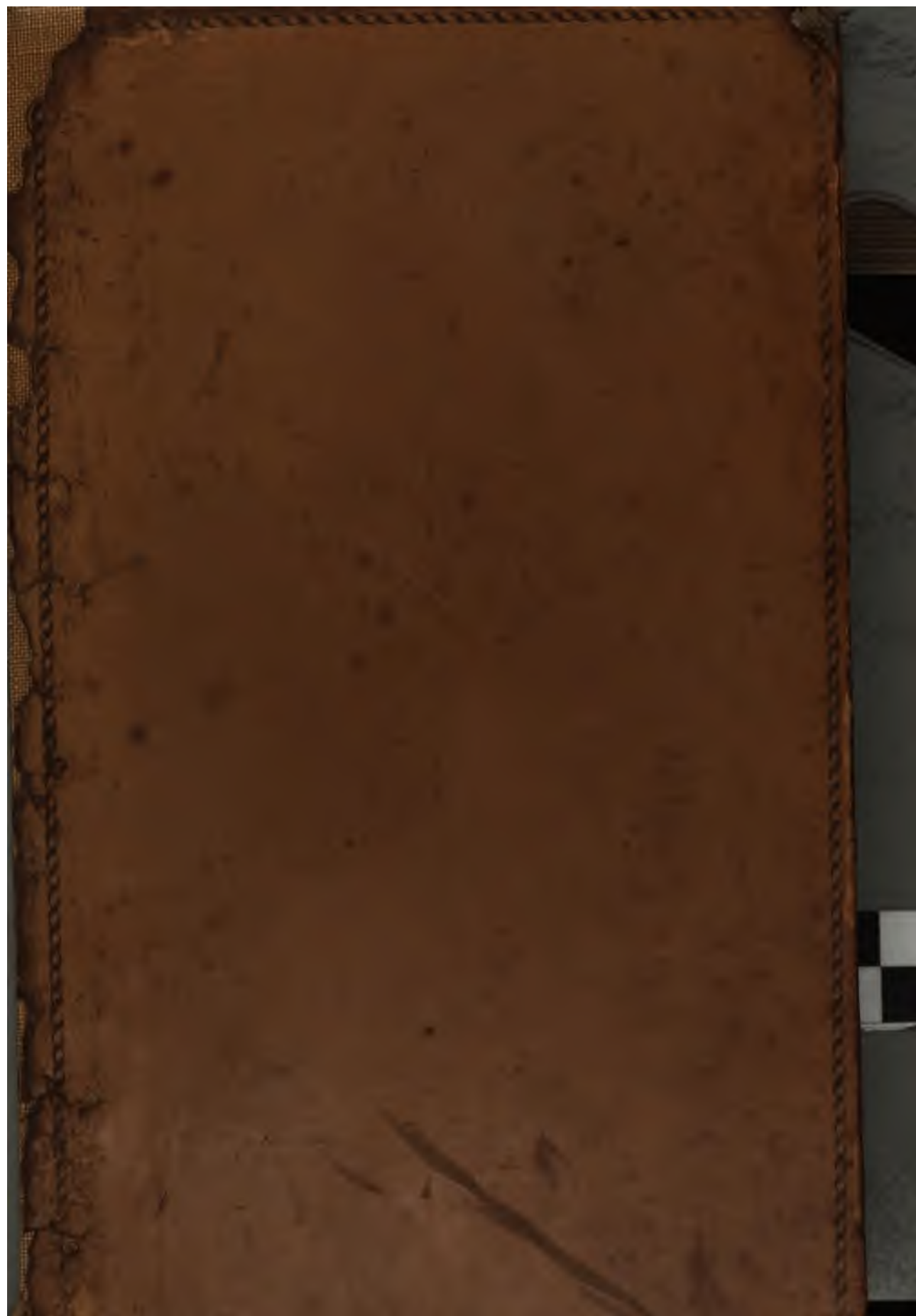
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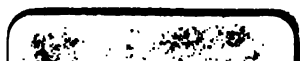
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REPORTS OF CASES
ARGUED AND DETERMINED IN THE
HIGH COURT OF CHANCERY,

DURING THE TIME OF
LORD CHANCELLOR THURLOW,
AND OF
THE SEVERAL LORDS COMMISSIONERS OF THE GREAT SEAL,
AND
LORD CHANCELLOR LOUGHBOROUGH,
From 1778 to 1794.

By WILLIAM BROWN, ESQ.
OF THE INNER TEMPLE, BARRISTER AT LAW,

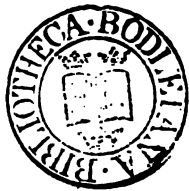
FIFTH EDITION,
WITH IMPORTANT CORRECTIONS AND ADDITIONS,
FROM THE REGISTRAR'S BOOKS;
From the Author's MS. Notes in his own Copy, intended for a further
Edition; from various MS. Notes of the highest authority, by eminent
contemporary and dignified Members of the Profession.

TOGETHER WITH
OBSERVATIONS FROM THE SUBSEQUENT REPORTS ON THE CASES
REPORTED BY MR. BROWN,
AND DECISIONS ON THE POINTS OF LAW TO THE PRESENT TIME.

By ROBERT BELT, ESQ.
OF THE INNER TEMPLE, BARRISTER AT LAW.

IN FOUR VOLUMES.
VOL. II.

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1820.



THE AUTHOR'S PREFACE

TO

THE SECOND VOLUME.

THE following sheets contain the principal cases which have received adjudications in the court of *Chancery* during the last year. Several others, of considerable importance, were argued, but, not having received judgment, it was thought improper to make them part of this publication; but, as the Reporter intends, if life, health, and leisure shall permit him, to publish the cases of each succeeding year, somewhat before the subsequent *Michaelmas* Term, until he shall have completed, at least, another volume, of the same size with that he published last year, those cases which were not ripe for production now, will appear in the order in which they shall be finally determined: and, at the close of the volume, proper tables will be added to the whole. The Reporter feels himself bound to repeat his thanks to his friends who have favoured him with their assistance, and to express, though faintly, his sentiments of gratitude to the profession, for the favourable reception with which his former volume has been honoured.

NO. 2. PUMP-COURT, TEMPLE,
16 Oct. 1786.

ERRATA, ADDENDA, &c.

- Pages 63, 64. To *Cooper v. Forbes*, add the following note: — "It was, however,
" settled to the contrary in the important case of Clarke v. Blake,
" postea, 320. Quod vide, with the Editor's note, which refers to the
" determination in C. P. 2 H. Bl. 399, and S. C. 2 Ves. jun. 673."
252. Under the title of the cause *Cockburn v. Ellison*, insert (Reg. Lib. 1786.
 A. fol. 596.)
- Ibid.* (252.) After the last word of note (4) add (5), to which annex as follows: —
 " This course is now the most frequent. See *Dawson v. Buck*,
 2 Madd. Rep. 184. &c."
320. *Clarke v. Blake*. Let note (1) commence thus: — "The M. R. had
 determined contra in *Cooper v. Forbes*, *antea*, 63, 64," and the ques-
 tion, &c.
342. 7th line from bottom of note: — For "every" read "even."
 9th line from bottom: — For "special" read "specific."

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CASES

ARGUED AND DETERMINED

IN

THE COURT OF CHANCERY.

SITTINGS BEFORE

MICHAELMAS TERM,

26 Geo. 3. 1785.

EDWARD Lord THURLOW, *Lord High Chancellor.* Sir LLOYD KENYON, *Lincoln's Inn Bart. Master of the Rolls.* RICHARD PEPPER ARDEN, *Esq. Attorney General.* ARCHIBALD MACDONALD, *Esq. Solicitor General.* Hall, October 28, 1785.

GEAST *against* BARBER. (1)

(No Entry.)

A COMMISSION having issued for examination of witnesses, and commissioners' names been struck, both the defendant's commissioners were prevented, by illness, from attending the execution of the commission: the commissioners for the plaintiff therefore proceeded *ex parte*. Publication had not passed.

Mr. Price moved, upon affidavit of the facts as above, for a new commission to examine the defendant's witnesses.

[*] Mr. Lloyd opposed the motion, insisting, that the affidavit should have stated, that the defendant, or his agents, had not seen, heard, or been informed of plaintiff's depositions, nor willingly will see, &c. till he hath examined, or till publication, and cited *Gilb.* 130, 131.

Mr. Mitford said, he understood that had been the rule before the oath of secrecy was enjoined to the commissioners; but that, since that time, the usual oath had been, that the party had not seen the depositions.

Lord Chancellor thought it reasonable that the affidavit should go the whole extent laid down by *Gilbert*, and upon such affidavit, he should order a new commission at the defendant's expence, with liberty for the plaintiffs to cross-examine.

Where commissioners on one side do not attend, in order to have a new commission the affidavit must state that the party or his agents have not seen, heard, or been informed of the depositions on the other side.

[*2]

(1) This cause came on for a hearing afterwards, and is reported *postea*, p. 61.

1785.

[*Vide* S. C. *antea*, 1 vol. 239. & note; and 4 Bro. P. C. 561. 8vo. ed.]

Lincoln's Inn Hall, 29th October.

No interest allowed on an account in *India*, not settled by the parties, but, at a distance of time, and with great difficulty, by a third person. See vol. 1. p. 239. (1)

[*3]

BODDAM *against* RILEY.

(No entry on this occasion.)

IN the Reporter's first volume, this case is reported, and is there treated as having been decided by Lord *Chancellor*. It was however, in fact, sent to the Master, to consider whether any, and what interest should be allowed upon the balance of the account. (2) The Master [on the 24th *May*, 1785] (2) reported that no interest ought to be allowed. There was an exception to the Master's report, in consequence of that disallowance. (2) The facts being as before stated.

Mr. *Harding* and Mr. *Mitford* supported the exceptions on two grounds. — 1st. On the custom in *India*, that such balances of accounts should carry interest; which custom was proved by affidavit: and Mr. *Mitford* cited a case of *Holme v. Allwright*, before the Lords Commissioners in 1770, which was a decree in the mayor's court of *Calcutta* for a sum of money due on balance of an account, for principal and interest. The parties coming over here, a bill was filed for the balance with *Indian* interest, and the Court referred it to the Master to take an account of what was due under the decree, with the interest usually paid in *India*. — The 2d ground was that, independently of [*] any custom, the balance would carry interest, this being a liquidated debt, though not regularly signed and allowed by the parties: and for this purpose, they cited *Blaney v. Hendrick*. 2 *Blackst. Rep.* 761. 3 *Wilson*, 205. S. C. *Barwel v. Parker*, 2 *Ves.* 365. *Vernon v. Chalmley*, *Bunb.* 119. 2 *Eq. Ca. Abr.* 529. *pl.* 4. and 532. *pl.* 17. 20.

Lord *Chancellor*. — The cases cited apply only where there are accounts regularly stated between the parties, in which case there is an implied contract on the part of the debtor to pay; and all contracts to pay, undoubtedly, give a right to interest from the time when the principal ought to be paid. But this is not so here. It is true, the sum claimed does, in fact, appear to be due, on balance, at the close of the account; but there was no settlement or acknowledgment by the debtor, which raises a contract to pay, and which is the only ground upon which interest is given. 1 *Wms.* 653. For, according to the argument of the exceptant, that whatever appears in fact to be due on the balance of an account shall carry interest, the rule must go to every debt for goods sold and delivered, which certainly is not the law of this country. Then, as to the custom of the country, even if it does exist to the extent laid down by the affidavits, I can not think I can apply it here. I am to say that, although the general rule of law is otherwise, yet, by reason of this custom, interest is to run on a debt not carrying interest

(1) See this decision affirmed, on appeal in the House of Lords, 4 Bro. P. C. 561. octavo edition; and note particularly the able arguments on the case on behalf of the defendants, the respondents, *ibid.* p. 571, 572. For various classifications of the law relative to the allowance of interest, see 4 Bro. P. C. 561. & 573. in the notes.

(2) No such thing. The Master had been ordered merely (and that on consent) to take an account of what was due to the creditors of the joint concern, and to compute interest on their debts as usual. *Vide antea*, 239. note from R. L. and 4 Bro. P. C. 566. octavo edition. The above report is also further incorrect; since the case did not come on before the Court on exceptions, but for a decree on further directions. See 4 Bro. P. C. 567.

in this country, because the original transaction was in *India*. — I cannot admit such a custom to control the clear law of this country.

1785.

Exception over-ruled. (3)

Upon an appeal to the House of Lords, the Lord Chancellor's [decree] was affirmed, on the 27th Feb. 1787. [4 Bro. P. C. 561. octavo edition.]

(3) The matter did not come forward upon any exception whatever, but on further directions, &c. See 4 Bro. P. C. 566, 567.

HOATH *against* HOATH.

(No entry.)

*Lincoln's Inn
Hall, 3d Nov.*

UPON a petition, the testator, by his will, gave a sum of 100*l.* to *Thomas Hoath*, at his age of twenty-one, and directed the interest, in the mean time, to be paid to his mother for his maintenance. *Thomas Hoath* dying under age, the question was, whether this legacy was, or was not, vested.

Giving the interest of a legacy to the legatee, or for his maintenance, vests the legacy. (1)

[*] Lord Chancellor said, It was impossible now to contend that where the interest of a legacy is given to the legatee, until the time of payment of the principal, that it is not a vested legacy: and the giving the interest for his maintenance is precisely the same thing.

[*4]

(1) *Vide Walcott v. Hall, postea*, 305. and the several other material cases stated, 1 *Roper on Legacies*, 182. *et seq.* The distinction, however, noticed *ibid.* p. 186. must be observed, that it is otherwise where a provision is made for the support of the legatees in some other manner than by way of interest specifically.

[*] MICHAELMAS TERM,

[*5]

26 Geo. 3. 1785.

Ex parte HODGSON.

BURNEY the bankrupt was partner with *Davidson*, who is in the *East Indies*, and being indebted separately to , to whom he had given a note, she pressed him for a better security; upon which he gave her a partnership note. Upon a separate commission against *Burney*, she proved this note; and the present petition was, that the proof of this joint debt upon the separate commission might be rescinded.

A partnership debt may be proved under a separate commission. (1)

Lord Chancellor refused the prayer of the petition, there being no distinction as to sole or separate debts, and said he thought proper to declare that debts, whether sole or joint, ought to be paid out of the bankrupt's estate; which is composed of his separate estate, and of his moiety of the joint estate, and therefore ordered that she should come in *pari passu* with separate creditors.

(1) See *Ex parte Cobham, antea*, 1 vol. 576. and see particularly *Ex parte Page and Ex parte Flintum, post.* 119, 120. But see the notes to *Ex parte Cobham, antea*, 576. *Ex parte Chandler*, 9 Ves. 35. *Ex parte Hall, ibid.* 349. *Dutton v. Morrison*, 17 Ves. 207, 208, &c.

1785.

TYSSEN *against* BENYON. [14 & 15 Nov.]

(Reg. Lib. 1785. B. fol. 145. b.)

The testator in a settlement of an estate, reserved to himself an election as to parcels, and afterwards, by indenture, he was to have an option of paying a certain sum within 24 calendar months; not having elected in his life-time, and his personal estate being inadequate to payment of his debts, the estate covenanted shall be conveyed.

[*6]

BY settlement, previous to the marriage of the plaintiffs, *Samuel Tyssen* and *Sarah* his wife, bearing date the 24th September, 1779, *Francis John Tyssen*, Esq. deceased, the plaintiff's father, agreed to convey certain lands and other estates, and, it being among other parcels, recited, that certain farms, &c. at *Foulden* in *Norfolk*, were of the rent of [380*l.*] he covenanted [within 18] calendar months, to purchase lands in the county of *Norfolk*, sufficient to make up, with the farms at *Foulden*, the sum of 500*l.* a-year, and to convey the same to uses, or to convey other farms, &c. at *Hackney* in *Middlesex*, of sufficient value to make good so much as the farms, &c. in *Norfolk* should be deficient of 500*l.* a year.—By an indorsement [*] on the deed (before the execution thereof) it was agreed by the parties, that it should be at the option of *Francis John Tyssen*, within twenty-four calendar months after the marriage, either to convey the lands according to the covenant, or to pay to the trustees 12,000*l.* to be laid out in the purchase of other lands to be settled to the like uses; and in the mean time, to be placed out at interest, and the interest to be received by the persons entitled, according to their respective interests; and it was also further agreed, the land intended to be conveyed should be under the control of *Francis John Tyssen*, with respect to an intended inclosure, and that he might exchange them, and settle the new allotted, or other purchased lands. The marriage took place, and there was no issue except the other plaintiff *Sarah* the daughter. *Francis John Tyssen* died 9th September, 1781, having made his will, bearing date the day of his death, whereby he gave annuities charged upon his estates in *Middlesex*, *Essex*, *Norfolk*, and elsewhere, and gave and devised all his manors, &c. to trustees for payment of debts and legacies, and for other purposes, and to allow to the plaintiff *Samuel* such sum of money yearly during his life as they should think proper, the remainder to accumulate during his life, and after his decease to be laid out to certain uses therein declared. (1)

The conveyance covenanted to be made by the settlement, having never been made, or the money paid; the plaintiffs filed their bill (2), praying that *Francis John* might be declared to have made his election to pay the 12,000*l.* or that an election might now be made: and, if the persons interested should elect to pay the 12,000*l.*, it should now be raised; and, if the election should not be considered as having been made, and should not be now made, that a proper part of the testator's estate in *Norfolk* should be conveyed upon the trusts contained in the marriage articles.

The plaintiffs, by the bill, insisted that *Francis John Tyssen*, by the devise of the premises covenanted to be conveyed, (included in the general devise) had made his election to pay the 12,000*l.* and if not so, that the defendants by letters and acts stated in the bill, had made such election.

(1) The inclosure was nearly completed when *F. J. T.* died, and his executors and trustees completed it; whereby other lands in *Foulden* were given in exchange, and which were valued at 650*l.* per annum. R. L.

(2) Insisting, that the testator had made his election by devising the estates; or if not, that his executors and trustees had done so since his decease. R. L.

The

[*] The heir at law, and executors submitted the question of election, and said that the testator's debts having exceeded his personal estate, they had no fund out of which to pay the 12000*l.* but the real estate.

Lord Chancellor said that, although the testator had covenanted to convey in twenty-four months, and, therefore, after that time he had lost his election; yet, after that time, as it lay in recompence, the court would have permitted it to be made good. And, after his decease, he having given both his real and personal estate to the same person, that person might perform either part of the covenant, and the court would not hold the devisee bound by the testator not having made his election within twenty-four months: but, in the events which had happened, his Lordship decreed the original estate at *Foulden*, or the lands which came instead of it upon the exchange, to be conveyed to the uses of the settlement, and to be made equal to the value of 500*l.* per annum, by the conveyance of other parts of the estates.

1785.

TAYLOR
against
BENTON.

HINDMAN against TAYLOR. [8 June and 16 November.]

(Reg. Lib. 1785. A. fol. 27.)

AN agreement had been entered into between the plaintiff, who was commander of a large trading ship, (an *East Indiaman*) and the defendant, for the purchase of the command; and, accordingly, a contract was made, by which the plaintiff covenanted, in consideration of 4000*l.* to resign the command, in order that the defendant might be appointed to it. Three thousand pounds were paid into the hands of Sir *Charles Raymond and Company*, bankers, by the defendant, to be applied to the drafts of the plaintiff, if the defendant should be appointed; otherwise to those of the defendant: and a bond was given for 1000*l.* The defendant was appointed, and made a voyage; but afterwards a new agreement was entered into, and 2000*l.* being paid on the part of the defendant to *Wildman*, in whose hands the contract was, he, by the consent, as he understood, of both parties, suffered the names to be taken off the contract.

[*] The plaintiff filed this bill for a discovery of the agreement, stating the 2000*l.* to have been paid in discharge of the bond, and of 1000*l.* of the remaining sum due. To this bill the defendant pleaded the facts stated as above, in bar to the discovery, as amounting to a release.

The plaintiff had also excepted to the defendant's answer, with respect to the payment of the sum into the banker's hands; and the exceptions having been over-ruled, had excepted to the Master's report.

The plea having been argued in *Trinity* term last, the Lord Chancellor had over-ruled it, on the ground that a plea of a legal bar is not a good plea to a discovery of matter in aid of a legal remedy: but his Lordship had ordered it to come on again with the exceptions to the Master's report.

Mr. *Madocks*, Mr. *Scott*, and Mr. *Stainsby*, in support of the plea.

The facts stated by the plea bring the matter to this question, whe-

[S. C. 2 Dick.
651.]

Plea, of matter which would be a good plea to the action at law, is not a good plea, here, to a bill for discovery leading to legal relief. (1)

[*8]

(1) See the observations of Mr. Beames upon this case, &c. *Elem. Pleas*, 276, 277. The case, however, of the demurrer, (in *Debigge v. L. Howe*.) there referred to, seems to make all the difference; and Mr. Beames admits the distinction, p. 277. The Editor therefore thinks the decision in the principal case perfectly sound, notwithstanding the objections adduced.

1785.

HINDMAN
against
TAYLOR.

ther a bill being filed for a discovery in aid of a legal remedy, a plea of matter, which will make an end of the cause at law, will be a good plea to the discovery. Such a plea ought to be good, otherwise the practice of the court does not support the purposes of justice. Where the relief is equitable, the plea to the relief is a bar to the discovery; therefore, if the plea be of matter which will be a bar at law, it ought, upon the same principles, to be a bar to the discovery. (2) If it be not, a man, without any legal claim, may have a discovery of all the transactions of another's life. It has been thrown out, as a doubt, whether the defendant could plead to the discovery any bar but an equitable one: but there are many instances of a legal bar being pleaded. In a bill for an account, and relief prayed, a settled account may be pleaded, and is held to be a good plea, unless the plaintiff amends his bill, and shews particular mistakes. So, if a plaintiff files a bill in aid of his legal remedy, if there has been a release, that may be pleaded in bar to the bill in aid, as well as to a bill for equitable relief. The cases in 1 Vern. 179. 2 Atk. 1. are instances of a plea of an account. An award may be pleaded, 3 Atk. 529. 644.; so a fine and non-claim shall be pleaded in bar, 1 Chan. Cases, 278.

[*9]

[*] To what end should the defendant be harassed with questions which can answer no purpose? Unless the plaintiff has a right, the court will never suffer the defendant to be compelled to answer. If the bar pleaded be a legal bar, and a question of law arise upon it, the court will take the opinion of a court of law how far it is a bar there: but, in this case, there can be no doubt; the acceptance of the money, and taking the names off the agreement, put an end to the plaintiff's claim. Lord *Hardwicke*, in *Brownsword v. Edwards*, 2 Vesey, 247. says, a plea must suggest a fact, it must go to a hearing; and if the party does not prove the fact, the court may direct an examination on interrogatories. Here, if the defendant should not prove the facts stated, he may be examined to discover the agreement; if he does, *Hindman* will be bound by the subsequent agreement to take the 2000*l*.

Mr. *Mansfield* and Mr. *Ainge* for the plaintiff.

It is not stated in the plea, that the plaintiff accepted the 2000*l*. in satisfaction of the whole sum agreed for; it is only stated that the names were taken off the agreement, and a memorandum made, that the plaintiff agreed the names should be taken off, and that he should acquit the defendant of the payment of more. This memorandum is in the possession of the defendant. Wherever a written agreement is detained or destroyed by the defendant, it makes the strongest ground possible for a discovery. If a legal bar were permitted to be pleaded here in bar of the discovery, it would deprive the plaintiff of the right of having the fact tried by a jury, or its legal effect. This is entirely new doctrine. There is no case, or even *dictum*, to support the position, that such a plea can be a bar to a discovery. All the cases are, where the plaintiff has come for relief into the court of equity. There if the defendant can answer (for to this purpose a plea is an answer); by a short point, it is admitted in that form. Here, though the plea be of a single fact, yet, the question being of the legal effect of that fact, the admission of it as a plea, would translate the jurisdiction.

[*10]

Mr. *Madocks* (in reply.)—The plaintiff will not be deprived of a trial by jury; for, if there is any fact in doubt which ought to [*] go to a jury, the Court will send it to one for trial. The question is,

(2) See *Debigge v. L. Howe*, stated *post*. 3 vol. 155. Mitf. Tr. 152. third edition. And the judgment in *Rondeau v. Wyatt*, *post*. 3 vol. 155.; with the observations of Mr. *Beames*, *Elem. Pleas*, 276, 277. and those in the preceding note.

whether

whether the acceptance of the 2000*l.* in full, is equivalent to a release. There is no question of law to decide.

It stood over a few days.

Lord Chancellor. — As a plea, this cannot stand. A plea in bar to the action is not a plea to the discovery. The matters pleaded are all special objections, not a general plea to the discovery. If you can plead that which is a bar to the action, and have it tried as a bar to the discovery, the whole is wrong. The more I think of it, the more I am convinced it cannot be set up as a bar to the discovery. The reason for permitting a plea in bar to the relief is to prevent the going into the whole cause, by that, which, if it stood *per se*, would put an end to it; but, where the bill is for discovery, the cause ends with the answer. Then the whole remedy being, upon the face of the transaction, at law, the question is, whether you shall by the plea bring the whole merits on here. — I strip the case of the matter of answering improper questions, because that is to be judged of in a different manner. I take it upon the general prayer. If he had prayed relief it would have been demurrable; and now you say, he shall not have a discovery, because his relief is at law. This is a case where he has no election, he must sue at law. The dry question is this, whether there is any objection, in natural justice, to a defendant giving a discovery in order to found a relief at law. The question, whether he shall answer improper enquiries, being out of the case, I think he cannot bar the plaintiff from giving him the trouble of an answer. Where the bill is for relief, the discovery is merely ancillary to the relief; therefore, if the defendant can shew that, without going further, there is one point which will bar the relief, the Court will first look into that point. The Court there takes the plea as the first method of getting at that justice which the subject has a right to obtain. Where the remedy is legal, to let the defendant refuse the discovery, is putting matters out of their train; for the Court can ultimately do nothing as to the remedy. If the bill be for equitable relief, and the plea be over-ruled, the defendant has this objection, that the Court has put him to a great expence, [*] in going through a cause, where he had brought it to a point which ought to have decided it in his favour. In the same case, if the remedy is at law, he has only to complain that he has been put to the expence and trouble of putting in a longer answer. As to the expence of the copy and answer, that the Court exempts him from; for the moment the answer comes in, he must be paid all the expence he has been at: and, as to the trouble, the Court cannot relieve him from that; therefore I think myself founded in declaring, that where the bill is for a discovery leading to relief at law, the defendant cannot plead, in bar here to the discovery, what will be a bar to the relief there.

Plea and exceptions over-ruled.

KEMPE *against* ANTILL.

(No Entry.)

MOTION for an injunction upon the merits, upon the coming in of the defendant's answer. The loyalists estates in America were, under the forfeit-

ing acts to be sold for the payment of debts. — This no ground for an injunction to restrain an action here on a bond. (1)

(1) *Vide Wright v. Simpson*, 6 Ves. 714, &c. *contra* to *Wright v. Nutt*, post. 3 vol. 326.

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HINDMAN
against
TAYLOR.

[*11]

1785.

KEMPE
against
ANTILL

[*12]

The bill stated, that in the year 1759, the plaintiff was appointed to the offices of Attorney and Advocate General for the province of *New York in North America*, and continued to exercise those offices, until the cession of independence to the Thirteen United States of *America*, by the treaty of peace in 1783 : and was possessed of very considerable personal property in the provinces of *New York* and *New Jersey*. That, during the disturbances in *America*, the plaintiff was attached to the sovereignty of *Great Britain* over the revolted provinces. — That in *July* 1776, the insurgents of the several revolted provinces declared themselves independent states. — That on the 11th *December* 1778, the inhabitants of the province of *New Jersey* passed an act, intituled “ An act for forfeiting to, and vesting in, the state of *New Jersey*, the real estate of certain fugitives and offenders, and for directing the mode of determining and satisfying the lawful debts, and demands which may be due from, or made against such fugitives and offenders, and for other purposes therein mentioned,” whereby, after enacting, that all the real and [*] personal estate of persons who should be convicted, upon inquisition to be found in manner as therein mentioned, should be confiscated, and vested in the States, and be sold, by commissioners therein named, and the persons themselves be adjudged guilty of high treason, the said act proceeded to recite, “ That whereas divers persons might have just demands against the offenders whose estates were or should be forfeited to, and vested in, that State ; and it being highly reasonable that such demands should be adjusted and paid, so far forth as the estates of such offenders respectively would answer and discharge the same : it was therefore, by that act, enacted, that the Court of Common Pleas in each respective county should, and they were thereby empowered and directed, to receive all such demands as might be made against the offenders whose estates forfeited might be in such county, which demands should be exhibited in writing, fairly stated, within one year after the sale of the estate of the person against whom such demands might be made, and, for that purpose the commissioners who should sell and dispose of such respective estates, should within one month after the sale of the same give notice, by advertisement in the *New Jersey Gazette*, &c. to all persons concerned, to exhibit their demands as aforesaid, before the expiration of the term limited for that end, and the claimants should respectively be intitled to *subpoenas* from the said Court, for all such witnesses as they might think necessary to support their respective demands, and all costs that might attend the settlement of such demands, should be taxed by the court, and the said demands, being received and settled by the court as aforesaid, should be transmitted by the court to the treasurer of the state, who should, within three months after the time limited for making such demands, pay to such persons the sum adjudged to be due, if the estate should be sufficient; if not, a proportional dividend to each such person.” That an inquisition was found against the plaintiff, in pursuance of the said act, in *New Jersey*; and that like proceedings were had in *New York*. — That, by the means aforesaid, the plaintiff was deprived of all his property, for the benefit of his creditors, and of the estates aforesaid, to the amount of many thousand pounds, which were much more than sufficient to pay all his debts; that, upon the cession of independence to the Thirteen United States, the plaintiff was deprived of his offices of Attorney and Advocate General; and obliged to take refuge in this kingdom. [*] That upon the 17th *November* 1769, plaintiff and one *John Weatherhead* became jointly and severally bound to *Alexander Colden*, to secure the payment of 200*l.* currency and interest : that the said *Alexander Colden*, in his life-time, or the defendant *Antill* who

claims

[*13]

claims to be his surviving executor, might have claimed, and still may claim the said debt, under some of the said acts, and obtain satisfaction for the same; or, if the said *Alexander Colden* died before the acts of confiscation, or if the said defendant was in any way disabled from making such claim, yet the persons beneficially intitled under the will of *Alexander Colden* were, at the time of passing the said act, subjects of the *American States*, and might have claimed the same. That such confiscated fund, being made expressly liable to payment of the plaintiff's debts, and being much more than sufficient for that purpose, it is against equity and good conscience that the defendant should put in suit the said bond against the plaintiff, instead of resorting to such fund for payment thereof, notwithstanding which the defendant has commenced an action against the plaintiff, in the Court of *B. R. Westminster*. — The bill therefore prayed an injunction.

The defendant, by his answer, admitted the general facts stated by the bill, and that the obligee *Alexander Colden* died before the disturbances broke out in *America*, and that the defendant, having taken part against the *Americans*, became equally obnoxious with the plaintiff; in consequence whereof he was obliged to quit that country, and take refuge in this, and his estates were, as he believed, since confiscated, and himself declared guilty of high-treason.

Mr. *Madocks*, Mr. *Scott*, and Mr. *Phineas Bond* for the plaintiff. All persons who had any claims upon the confiscated estates, had it in their power to apply to the Court of Common Pleas, to enforce the execution of the act for the sale of the confiscated estates. This appears from the act of assembly. It is also admitted, that the plaintiff's estates were sufficient to pay the debts, with a considerable surplus. The defendant qualified as executor in *New Jersey*. His co-executor qualified with him, but is since dead; and the persons who are actually interested are now resident in *New York*, and, one executor being dead, and the other absent, may take out administration to the testator, and compel the execution of the act. The excuse set up [*] is, that the defendant is a delinquent, under the law of *New York*, and therefore cannot sue there: but this is answered. In the present case, the bond is in the state of a satisfied bond, because the government there have taken possession of the estate, which is the fund to pay the debt. He had it in his power to have enforced the payment. It is like the case of a creditor who has it in his power to obtain payment from the proper fund, and refuses so to do; he shall not have further remedy. At all events, he had an election as to his fund, and it is against the law of nature for him to sue the plaintiff instead of the estate, as the plaintiff never can recover against the government there.

Lord Chancellor — It is impossible for the court to relieve the plaintiff against the acknowledged right of the defendant to sue. If this case had been made out, to the extent that a loyal subject of the *American States* had made himself party to the confiscation of this property, and had, under that commission, money in his hands, applicable to the payment of this demand, and yet maliciously sued the plaintiff, it would bear an argument. But can it be argued here that he has a right in a particular fund? and, if not so, how can it be consonant with natural justice, to prevent him from suing upon a contract, in its own nature transitory.

The motion stood over at the desire of the plaintiff's counsel, in order to consider the matter; but they afterwards gave it up, and the money was paid.

1785.

KEMPE
against
ANTILL.

[*14]

1785.

ACTON *against* MARKET.

(Reg. Lib. 1785. A. fol. 46.)

*Lincoln's Inn
Hall, 5th Dec.*

[Where a defendant has obtained a verdict at law, and an injunction bill is filed against him whilst out of the kingdom, the plaintiff in equity cannot sustain an injunction against him unless he pay the money into Court.] (1)

[*15]

† But see *Sherwood v. White*, 1 vol. 452.

(1) S. P. *Sherwood v. White*, *antea*, 1 vol. 452. *Culley v. Hickling*, *post.* 182. and *Potts v. Buller*, 1 Cox, 330, &c.

ROWLEY *against* RIDLEY. [Dec. 9.]

(Reg. Lib. 1785. B. fol. 22. b.)

Interrogatories to falsify an examination.

AN order having been obtained for the examination of certain persons before the Master, *pro interesse suo*, liberty was now moved for to exhibit interrogatories before the Master, to falsify their examination, and ordered, as of course, without notice.

*Lincoln's Inn
Hall, 21st Jan.*

Ex parte MARLIN.

Where partnerships have commenced at different times; upon a bankruptcy of all, the court will direct separate accounts, and that each estate shall first bear its own debts. (1)

IN 1771, *Thomas Pettit* had separate creditors.

In 1772, *Pettit* and *Flight* became partners.

In 1781, *Pettit*, *Flight*, and *Runnington*, became partners.

In November 1785, a commission of bankruptcy issued against the last three.

This was a petition for separate accounts of the three estates. Granted: though the Court did not know any instance of dealing in the firm of two partners forming part of the firm of three.

Copy of the minute of the order.

I do order that it be referred to the major part of the commissioners named in the commission issued against the said bankrupts *Thomas Pettit*, *John Runnington*, and *Richard Flight*, to keep distinct accounts of the joint estate and effects of the said bankrupts *Thomas Pettit*, *John Runnington*, and *Richard Flight*, and of the joint estate and effects of the said *Thomas Pettit* and *Richard Flight*, and of the respective separate estate and effects of each of the said three bankrupts, and that the several creditors on each of the said several estates, be admitted to prove their respective debts under the said commission, against the said bankrupts [*] *Thomas Pettit*, *John Runnington*, and *Richard Flight*, and that

[*16]

(1) This is now done under the general order of the 8th of March, 1794.

each of the said respective estates be applied in satisfaction of the creditors of each respective estate, and the surplus, if any, of each respective estate, after full payment and satisfaction of the debts on such estate, be carried over to, and constitute part of, the joint estates of the said bankrupts *Thomas Pettit*, *John Runnington*, and *Richard Flight*, and let costs of this application be paid out of the joint estates of the said three bankrupts, and let the costs of keeping the said several distinct accounts hereby directed be borne and paid out of each of the said respective estates, according to the proportions which, in the judgment of the said commissioners, the same ought to be borne and paid by each of the said estates.

1786.

Ex parte
MARLIN.

[*] *HILARY TERM*,

[*17]

26 Geo. 3. 1786.

HOLWORTHY against ALLEN.

(1)

[S. C. 1 Cox,
202. *Quodvide.*]

ALLEN took *Holworthy* in execution for costs; afterwards *Holworthy*, as executor, became entitled to a demand on *Allen*, superior to that for which he was in execution. Mr. *Hollist* moved, on this ground, that he might be discharged.

Court will not, upon motion, discharge a person in execution for costs upon a demand arising to him upon the person to whom he is in execution.

Lord *Chancellor* said, two questions arose; 1st, Whether the Court could adjust such demands; 2d, Whether it could be done upon motion.

The costs have been taxed on one side, and the party taken into custody. On the other side, a demand has arisen against the party to whom he is in execution. It is in the nature of a set off. The Court never has done this upon motion; it is besides only upon equitable grounds, as, under the statute of set-off, it could not be done.

(1) See 1 Cox, 202. There was no entry in R. L. on this occasion; but, from a subsequent entry, it appears the matter was soon afterwards compromised.

HENLEY against AXE.

(No Entry.)

[*18]

ABILL filed to set aside an agreement for an annuity, upon payment of a fair consideration. It had been referred to the Master, and, upon his report, the circumstances appeared to be these:—

The plaintiff, being twenty-three years of age, and entitled to an estate upon the death, without issue, of an uncle, of the age [*] of fifty-two years; the uncle, being at the time unmarried, and a lunatic, without any probability of having issue, the defendant granted to him an annuity of 200*l.* per annum, during the joint lives of himself and his uncle, in consideration of 6000*l.* to be paid by the plaintiff to the defendant, six months after the death of the uncle without issue; and

Bill to set aside an agreement for an annuity (which had been paid) during the uncle's life in consideration of a sum payable at his death, *sans issue*, dismissed. in

1786.

HASLEY
against
Axx.

in case of the death of the plaintiff before the uncle, or of the uncle's leaving issue, the defendant was to lose his money. The annuity had been paid during the uncle's life, who was now dead without issue.

It came on now for further directions upon the Master's report, when the defendant's counsel prayed that the bill should be dismissed.

Lord Chancellor said, It must be so. There has been a good bargain; but, although I cannot encourage such agreements, I cannot set them aside but upon broad grounds.

Bill dismissed without costs.

DANVERS against MANNING. [24 & 25 January.]

[8. C. 1 Cox,
203.]

(Reg. Lib. 1785. A. fol. 808. b.)

Testator gave certain legacies in stock, he then gave others without that addition, he then gave legacies, and directed stock to the amount to be sold, this made all the legacies, legacies of stock.

[The testator having miscalculated what would be left of a particular sum, and given it as such [supposed] "remaining sum" to A. for life; she was held entitled to the real sum which was actually left remaining. (2).]

[*19]

FRANCIS Degen, late of *Hammersmith*, in the parish of *Fulham*, in the county of *Middlesex*, merchant, deceased, being at his death possessed of a considerable estate, consisting (amongst other things) of 4 per cent. bank annuities, 3 per cent. bank annuities, and other public funds, duly made his last will in his own hand-writing, dated 19th March, 1783, whereby he gave all his estate, real and personal, unto defendants *William Manning* the elder, *John Danvers* the elder, and *William Hodge*, in trust, for the following uses: he gave to Mrs. *Catharine Foljambe*, of *Hammersmith*, widow, (amongst other things,) the interest of 6000*l.* 3 per cent. consol. Bank annuities, with the interest of 1000*l.* in the *Royal Exchange* assurance, with 36*l.* a year more, 3 per cent. Bank long annuities for life only (1); and having given several specific legacies to *William Manning* the younger, second son of the defendant *William Manning*; and, in particular, a pecuniary legacy of 8000*l.* [*] sterling, and to five several persons therein named (*i. e.*) to each of said persons 500*l.* of his 4 per cent. consol. Bank annuities he gave as follows:—"I give and bequeath to my esteemed friend *John Danvers*'s family, of *New-court, Broad-street*, in the city of *London*, as follows: "to *John Danvers*, the eldest son, 500*l.*; *Charles Danvers*, the second son, 300*l.*; *Elizabeth*, the eldest daughter, 300*l.*; *Frances*, the youngest daughter, 300*l.*; *Mrs. Danvers*, wife of *Mr. John Danvers*, 100*l.*; to *Mrs. Lindagreen*, wife of *Mr. Charles Lindagreen*, of *Chelsea*, 100*l.*:" "I give to my esteemed friend, *Mrs. Elizabeth Bennett*, 100*l.* to be paid from [the] 4 per cent. Bank annuities." And having given several legacies to *Mrs. Cobb*, to his three executors, to his servants, and the parish boys, amounting, in the whole, to 600*l.* He then "willed as follows: (*i. e.*) the above legacies to be paid in six weeks after my decease, amounting to 600*l.* of [the] 4 per cent. Bank annuities, for what said annuities will fetch, after the first dividend is due on them, after my decease, I mean the same to all the rest of the legacies of 4 per cent. I have bequeathed away, each 100*l.* &c. is in stock." He gave several other legacies, and went on as follows (3): "and after the decease of *Mrs. Catharine Foljambe*, I give that annuity she holds in her life-time to the family of the *Danvers*; I mean, to *John*, *Charles*, *Elizabeth*, and *Fanny*, or amongst as many as shall then be alive." The testator afterwards made a codicil to his said will in his

(1) "To commence as it came due after his decease." R. L.

(2) See 1 Cox, 203, 204.

(3) "All the rest and residue of my estate in England, or other places, landed or personal, I give to *W. Manning*, jun. and," &c. R. L.

own hand-writing, (without any date) in the words following: (*i. e.*) "I find I have willed away only 5600*l.* (4) I give and bequeath the interest of the remaining 400*l.* to my esteemed friend Mrs. Catharine Foljambe for her life only; at her decease, it must go with the rest to the Danvers family." The testator afterwards made another codicil to his said will in his own hand-writing without any date, whereby he gave and bequeathed several specific and pecuniary legacies to several persons, but did not thereby revoke or alter any of the legacies by his will and first codicil given to the plaintiffs. The testator died on 30th of September, 1783, without having revoked or altered his will. The executors proved the will, and took possession of the personal estate of the testator, and paid his funeral expences, debts, and some of the legacies: but, doubts arising about others of the legacies, whether they were pecuniary legacies, or legacies of stock, the plaintiffs John Danvers the younger, Charles, Elizabeth, and [*] Frances Danvers, together with Bennet and his wife, filed the present bill, stating the will as above stated, against the defendants, the executors, residuary legatee, and legatee for life, praying payment of their legacies, and that the funds given to Mrs. Foljambe for life might be transferred into the name of the accountant general, in order that it might be secured for them after her decease, according to their several rights therein. The defendants, by their answers, admitted the will, but said they were advised, that the legacies given the plaintiffs the Danverses, were not legacies of so much money, but of so much stock only. To prove this, they stated the legacy to the defendant Manning, expressly given as Sterling, and two legacies of 500*l.* each, in his last codicil, given to two young ladies out of his running cash. They also set forth a paper in the hand-writing of the testator, found in his pocket after his decease, and supposed to be intended as instructions for a new will, in which the legacies were set down, with the addition of 4 per cents. to each.

Mr. Mansfield and Mr. Mitford (on behalf of the Danverses) contended, that their legacies were not stock but money legacies. The legacies given before are expressly stock legacies; then come the legacies to the Danvers family without any such conclusion. The first legacy which follows with any such reference, is that to Mrs. Bennet. The only way to construe them stock legacies, is by referring the codicil to them, which is very inaccurate: for, calculating either way, he has not made the sums agree. By the last clause in his will, he has made the sums depend upon the sale of his stock; but this only refers to the legacies therein contained, not to those of the Danvers family. He has restrained it to stock, where he meant it to be so restrained.

Mr. Ambler and Mr. Nedham (for the defendants.)—The only question is, whether these are legacies of stock, or money legacies. The will is very inaccurately drawn; but enough appears upon it to shew the testator intended them to be legacies of stock. The codicil makes it clear that all were to be stock, except those directly given out of other funds. He looked throughout to the quantity he had of stock. The Court will rely upon the clear expressions of the will, where they are [*] connected with each other in point of sense, not upon omissions, occasioned by negligence. He has done enough to shew that the legacies are to be paid out of the funds. He gives his 3 per cents. to Mrs. Foljambe for life, then the legacies to the three ladies to be paid out of the 4 per cents. Then he gives the legacies to the Danvers family, then the 100*l.* legacy, and, after that, the legacy to Mrs. Bennet to be paid out of the 4 per cents. Nothing is more usual than, in making wills, when the

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DANVERS
against
MANNING.

[*20]

[*21]

(4) "In Bank 4 per cents.; and I find I have there at present 6000*l.*" R. L.

party

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DANVERS
against
MANNING.

party has named the fund, not to repeat it to the next legacy. Then the legacies, amounting to 600*l.*, are expressly to be paid out of what the stock would sell for, after payment of the first dividends; and he says he means the same as to *all the legacies he has bequeathed away*. Then, by his codicil, he says, I find I have willed away 5600*l.* 4 *per cents*. This must apply to all the legacies; without those to the *Danvers*, the legacies would not near amount to that sum. The having mistaken the whole amount will not vitiate the clear intent.

Mr. King (for Mrs. *Foljambe*.)—With respect to the 400*l.*, it must be taken, not as a legacy, but as a residue; and, although the residue turns out to be larger, she must take that; as, if it had been less, she could have taken no more than the residue.

Lord Chancellor (5).—Upon the whole, the best construction that can be put upon this will, is that insisted upon by the defendants. He professes an intention of disposing of his whole property. With respect to the legacies to the five ladies, if the case went no further, it would be impossible to construe them otherwise than stock legacies. Then there are several other legacies to be paid from the 4 *per cents*. There is no doubt as to the common rule, that the last antecedent shall govern what passes before. I think it at least as probable, that the words govern *all the class* of legacies as the contrary. He then gives the legacy to Mrs. *Cobb* and the other persons, including the servants and parish boys, amounting to 600*l.* Here he adds *out of the stock*, to be sold after the first dividend. The intention is, that, as they were small legacies, he did not intend the executors to transfer the stock, but to raise them by sale. Then he goes on, I mean the same to *the rest of the legacies* I have bequeathed, referring back to the former legacies: this must include all the classes. To say, in such a will, it is manifest what the [*] intention was, is too much; the expressions render it open to much argument, as to the application to the second class; but it is probable he meant it so to apply. But it does not rest here; for, by the codicil, he recites his disposition of a fund. He thought he had disposed of it to a farthing. A man who gives a fund in proportions, must mean proportions of that fund. It therefore amounts to a supposition, on the part of the testator, that they were parts of the fund. But he has mistaken the fund, and computed it wrong, so as to make a different residue. But although that be the case, it will be nearer the general intention to give the residue, as it really is, to Mrs. *Foljambe* for life, than the contrary construction.

[*22]

(5) See also the judgment of Lord *Thurlow*, reported by Mr. Cox, 1 Cox, Ch. Ca. 203, &c.

ROBINSON *against* HARDCASTLE. [26 & 27 January.]

(Reg. Lib. 1785. B. fol. 752.)

[*Vide* S. C.
post. 344.]

A power being
given to ap-
point an estate
among chil-
dren: *Quære*,

Whether it is well executed by giving to a son for life, with remainder to his sons in tail? (1)

BY indentures of lease and release 13. and 14. *July*, 1713, the release being between *Robert Dunn*, then of *Great Chilton*, in the county of *Durham*, gent., and *Jane* his wife (grandfather and grandmother

(1) It was afterwards held a bad appointment; and that such a power to appoint amongst children did not extend to grand-children. See *postea*, 344. For some observations of Lord *Eldon* C. in approbation of what Lord *Thurlow* says in this case, *postea*, p. 30. See in *Thelluson v. Woodford*, 11 Ves. 145.

of

of plaintiff), deceased, and *James Dunn* (plaintiff's late father,) also deceased, and other parties, in consideration of a marriage intended between said *James Dunn* and *Dorothy Wright*, and of a settlement made by *Robert Wright*, of lands in *Dalton Piercy*, for the marriage portion of *Dorothy*, *Robert Dunn* and *James* his son, conveyed to trustees the estate at *Great Chilton*, &c. in trust for *James Dunn* the son for life, and to secure a rent-charge by way of jointure to *Dorothy*, remainder in trust for such child or children of the body of the said *James Dunn*, upon the body of the said *Dorothy Wright*, to be begotten, and to, for, and upon such estate, estates, trusts, intents, and purposes, and in such proportions, as the said *James Dunn* the son should, at any time during his life, by any deed or deeds in writing, or by his last will under his hand and seal to be executed in the presence of two or more credible witnesses, direct, limit, or appoint: And in default of such direction or appointment, or as and when the said uses, estates, and trusts to be directed or appointed, should respectively end, and determine, then in trust for the first son of the body, &c. in tail, and in default of such issue to the second son in tail, &c., and in default of such issue, in trust by [*] mortgage or sale, or the rents and profits in the mean time, to raise and pay 800*l.* for the portion of all and every the daughters of the marriage, if more than one, to be equally divided among them, to be paid at their respective ages of twenty-one, or marriage, with benefit of survivorship, in case of death before that time, and, subject to such trusts, then in trust for *James Dunn* the son, and the heirs of his body, and, in default of such issue, for *James Dunn* the son in fee. — The marriage took effect, and they had issue one son named *James*, and four daughters, namely, *Margaret*, the plaintiff *Elizabeth*, *Anne*, and *Catharine*. — *Robert Dunn*, *Jane* his wife, and *Dorothy* the wife of *James Dunn* died in the life-time of *James*; *Margaret* intermarried with the defendant *Wright*; and the plaintiff intermarried with *Christopher Robinson*, since deceased; *Anne*, another of the sisters, intermarried with the defendant *Hardcastle*, *Catharine* remains unmarried. *James Dunn*, having such power of appointment of the settled estates, and being possessed of certain leasehold estates at *Dalton Piercy* aforesaid, held by lease for twenty-one years, under *Queen's College*, *Oxford*, and being also possessed of personal property, to a considerable amount, some time before his death, made his will, properly attested to execute the power, and did thereby charge all his messuages, lands, &c. at *Great Chilton* and *Dalton Piercy*, with payment of all his just debts and funeral expences, and also with the payment of 12*l.* a year to his daughter the said *Margaret Wright*, during her life, and with the further payment of 30*l.* a year to his said daughter *Catharine Dunn* for life, and the testator did thereby give and devise his said estates at *Chilton* and *Dalton Piercy*, so charged and chargeable as aforesaid, and all other his real estates whatsoever, unto his sons-in-law, to the use of his son the said *James Dunn*, the plaintiff's brother, and his assigns for his life, without impeachment of waste, and after the determination of that estate to the said trustees during his life, to preserve contingent remainders, and after the decease of his said son, then to the use of the sons of the body of his said son in tail-general, remainder to the use of all and every the daughters of his said son, in tail general, as tenants in common, and in default of such issue as to all that part of his estate at *Great Chilton* which lies [on the east side of the post road, leading from *Rashby Ford* to *Ferry Hills*], and all the farm at *Dalton Piercy*, commonly called the Out Farm, to the use of his daughter *Elizabeth*, the plaintiff, her heirs and assigns,

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Whether where the first use is illegal, it shall defeat the limitations over or accelerate their coming into possession. (2)

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for ever ; and as to all that part of this estate at *Great Chilton*, situate, &c., and also all that part of his estate [*] at *Dalton Piercy*, called the Town Farm, to the use of his daughter *Anne Hardcastle*, her heirs and assigns, for ever, with a power to his son *James Dunn* to charge all the premises at *Great Chilton* and *Dalton Piercy* with any annual sum not exceeding 100*l.* as a jointure, and to appoint any part or parts of the real estates to his younger children and their heirs, in such manner as his said son should think fit, as a provision for such child or children and their issue, and to charge any part or parts of the estate with any sum or sums of money he should think fit, as portions for younger children ; and did also give to his son a power of leasing in possession, and not in reversion ; and declared his will to be, that in case the limitations to his two daughters should take place, they should severally pay and discharge an equal moiety of such annuities, &c. as should be chargeable upon his estates ; and after giving some specific legacies to his daughters, gave the residue of his personal estate to his son. By a codicil, bearing even date with his will, and duly attested, after reciting the devise in his will of his estates at *Dalton Piercy*, and that those estates were leasehold, not freehold, he bequeathed them to his sons in law, in trust to renew the leases from time to time, and to pay the rents, &c. to the persons who would be entitled, from time to time, to his estates in *Great Chilton* ; and in case the limitations to his daughters should take place, from that time that part of his estate of *Dalton Piercy*, called the Out Farm, in trust for the plaintiff, and that part called the Town Farm, in trust for *Anne Hardcastle*. *Anne Hardcastle* died in the life-time of the testator her father, who himself died in September, 1767, leaving the said *James Dunn*, the plaintiff's said late brother, his only son and heir at law, him surviving, who, in June, 1769, suffered a recovery of the real estates, to the use of himself in fee, and, in December, 1777, made his will, and thereby gave and devised his messuages, lands, &c. in *Great Chilton* (subject to the annuities to his sisters) to his nephew the defendant *John Hardcastle*, his heirs, and assigns, for ever : and he thereby gave and bequeathed all his messuages, &c. at *Dalton Piercy*, to the defendant *George Robinson*, eldest son of *Christopher Robinson*, the plaintiff's late husband, to hold to him, his heirs and assigns, for ever ; with a proviso, that if the said *George Robinson*, his heirs or assigns, should commence any suit in any court of law or equity, or should disturb the defendant *John Hardcastle*, his heirs or assigns, in the [*] possession or enjoyment of the premises at *Great Chilton*, or refuse to do proper acts to confirm the estate therein, this devise should be void, and the devised estate go to *John Hardcastle*. *James Dunn* afterwards made a codicil, dated January, 1779, reciting, that the estate held of Queen's College, *Oxford*, might be renewed during his life ; and declaring, that, if it should be so, any new lease should be subject to the provisions in the will. He died unmarried in 1779, leaving *Margaret Wright*, the plaintiff *Elizabeth*, and defendant *John Hardcastle* and *Catharine Dunn*, his heirs at law. After making his will, he surrendered the leasehold premises, and took a new lease.

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Mr. Mansfield and Mr. Mitford (for the plaintiff). — The object of the bill is to have the estate at *Great Chilton*. The devise of the leasehold estate was revoked by parting with it to the son in the father's life-time, and subsequent to the making of the will. Notwithstanding, *Dunn* the son was only tenant for life, he did, in June 1769, by means of the trustees joining, suffer a recovery to himself, his heirs and assigns. The words of the power given to *Dunn* the father were, " in trust for children, and to, for, and upon such estates, trusts, and purposes, as *Dunn* should think proper." This power gave the tenant for life, a complete

a fee as to the disposal of the estate, limited only as to the object is objected, that the power has not been well executed; and the objection is, that the power was confined to children: that *Dunn* had no power to appoint to children, and to their children. The answer is, that he is to limit estates at his pleasure; so that he may limit life estates. The power gives to *Dunn* the father the latitude. It gives to the person who has the power, a mode of power, *Zouch v. Woolston*, 2 Burr. 1136. In *Cavendish v. Cavendish*, B. R. 22 Geo. 3. — upon Lady *Burlington's* will in 1755, the children were held to be objects of the power; and, unless that case is distinguished some how from this, it is a decision upon it. But is another ground taken in that case, which applies strongly to it was held, that the void limitation would not prevent those who are good from [*] taking effect. So here, if the appointment to children be void, yet the appointment to children is good, and valid: for the appointment will be held good as far as it was in the power of the man to do the act. *Alexander v. Alexander*, 2 Ves. 641. The power may be good in part, and bad in part, and the excess is void, where the execution is complete, and the bounds between the good and the bad are clear; and the same is the doctrine in *Adams v. Adams*, 11 Ves. 401. Now, the interest limited to the plaintiff in this case is held to be good, and ought to take effect, though the remote limitations are void; it will be the same as if the power had limited to the son for life, and then to Mrs. *Robinson*, as a contingent limitation; and, if not too remote, it is good, and the act of *Dunn* the son, in suffering the recovery, will not have the effect of defeating the limitation: for those who are under the trustees will be considered in the same light as the plaintiff.

But supposing the execution of the power to be void *in toto*, if good in part, the limitation to Mrs. *Robinson* has been defeated, the recovery suffered, she will be entitled to a satisfaction out of her personal estate, come to the hands of the son, for the loss sustained, in being deprived of the moiety in the *Chilton* estate. *Stott and Mr. Graham* (for the defendants). — The words of this will be fully satisfied by a division among the children. In *Lowndes v. Lowndes*, in this Court, about a year ago, your Lordships intimated a doubt concerning the law of *Cavendish v. Cavendish*, that it was an open case. It does not appear that there is any case which supersedes the limitation in *Cavendish v. Cavendish*: the power was intended to be the same as in the cases of *Alexander v. Alexander*, and in *v. Andrews*. † In the former of those cases, the giving a recovery interest was holden an elusory execution of the power, in the case of *if the deceased daughter had left issue*, the gifts could not

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Burlington devised to the late Duke of *Devonshire* for life, and after his death the use of his children for such estates, and in such shares and proportions, and such powers, provisions, conditions, restrictions, and limitations as he, by deed or appointment; he by will devised the premises to the younger sons in strict settlement, for a good execution of the power. (3)

v. Andrews. Power to a feme covert to dispose by deed or will of 1300*l.* for children, in such manner and form, and to such uses and purposes as she should think fit. She gave 400*l.* to R. absolutely, 400*l.* to E. at twenty-one, and 500*l.* to be interest and dividends to P. for life, and after her decease the principal divided among her children. — Under the very full words of this power, the appointment was held to be well made. *Chanc. Hil. 1782.* (4)

case is reported fully 7 T. R. 741. note. See it much commented on by Sugden, in his work on Powers, p. 412.

Sugden observes this note is erroneous; and states that most of the cases in the notes are misreported. Sugd. on Pow. p. 418.

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have

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have been to them. *Cavendish v. Cavendish* does not apply; for that [*] case went upon its own circumstances. The Duke having very considerable property besides, did not confine himself to that which was the subject of the power, but made large bequests besides; so that the devisees, having taken the benefit of those bequests, were barred from bringing ejectments to try their right to the premises disposed of by that will. With respect to the striking out the intermediate limitations, there is no doubt, but, as in *Adams v. Adams*, the extension of the limitation to grandchildren is bad. The intent of the owner must have great weight; and it is to be considered according to the rules of language, what that intent is, as in *Avelyn v. Ward*, 1 Ves. 420. *Jones v. Westcombe*, 1 Eq. Abr. 245. Dougl. 78. Rolle's Abr. title Remainder. 2 vol. 415.

Mr. *Mansfield* (in reply). — Such a power as this is to be construed very liberally; it amounts to giving him a fee; it is a power of the very largest extent, like the case of *Zouch* on the demise of *Woolston v. Woolston*, 2 Burr. 1136. These powers are very different from powers given under acts of parliament, which are always construed very strictly. The first question is, whether the power enabled *James Dunn* to give his children estates for life, or he must at once exhaust his whole power. The power is to give to his children for such estates, and upon such trusts, as he shall think proper. The second objection that is made is, that the power is to give to the child or children, which does not extend to grandchildren: but this confined sense is not given, in law, to the word children. It is not always confined to children, properly so called: as in *Wild's* case, 6 Co. 16.; nor is it so confined in common language. It is objected again, that if he can carry it further than children, he may carry it to great and great-great-grandchildren: but where an ancestor gives his estate among his children, he means it to descend. It is also objected, that the children are purchasers; so are the grandchildren also. It may extend to all the descendants, though it cannot to strangers. It was observed by Lord *Mansfield*, that the intent of the power was to keep the estate as long in the family as the law would admit. With respect to the authority of *Alexander v. Alexander*, there were no such words in that case as there are in this; it was merely a power to dispose of money among children, in such proportions as the mother should think [*] fit. Lord *Mansfield* treated that as a very different case. The case of *Adams v. Adams*, in Cowper, is also very different from *Cavendish v. Cavendish*, and still more different from the present case. The words there expressly limited the power, and in fact there was no dispute upon the point: the counsel gave it up. There are words in this case not to be found in that. But *Cavendish v. Cavendish*, upon both the points, comes up to this. The first point there was upon the execution of the power; the second upon their being no son. Lord *Mansfield*, for the first time in a court of law, took up the point of election; but that point was not argued on behalf of any of the parties, because, during the life of Lord *Richard Cavendish*, the appointment was clearly good, he being the appointee. Lord *Mansfield* observed there were three grounds on which all the judges held the execution of the power to be good; 1st, the subject-matter; 2dly, the manner of execution; 3dly, the nature of the power; and held it a totally distinct case from *Alexander v. Alexander*. There was, in *Cavendish v. Cavendish*, another ground, which rendered it unnecessary to determine the point. The limitation was to Lord *Richard* for life; remainder to his first and other sons in tail; remainder to Lord *George* for life; remainder to his first and other sons in tail. The appointment to Lord *Richard* was held good, and also that to Lord *George*. Lord *George*, in that case, and Mrs. *Robinson* in this, stand precisely in the same

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same situation. The second point is, whether, supposing the power to be exceeded, the subsequent limitation to the daughter must fail. Mr. *Graham* contends, that the execution of the power, under the words here used, must be construed strictly, like the case of the monk in Rolle's Abr. tit. Remainder; (2 Rolle's Abr. 415.) and, therefore, the first limitation not being good, the subsequent execution of the power would fail also. I have always thought these uses were construed otherwise, even at law. This is only the declaration of a trust, which, by its original creation, was to be declared by any deed or writing. The will, like all others, is to be taken from what appears upon the face of it. The estate is a trust, not a freehold. The limitation is to *James Dunn* the son, with remainder to his sons, remainder over to his daughter *Mrs. Robinson*. But there is no case where the first devise being bad, has made the subsequent devises bad also. If the first limitation cannot take effect, the subsequent ones will take effect immediately. Mr. *Graham* has mentioned a few cases, which I shall [*] repeat, merely for the sake of laying them aside from the present case. *Jones v. Westcombe* was the reverse of this: the testator had meant to do one thing and had done another. *Avelyn v. Ward* was much such a case as *Jones v. Westcombe*. *Watson v. Shepherd*, in Douglas, has no relation to the present case. In all the cases, as, for instance, where the gift is to a monk, or other person who cannot take, the subsequent limitation must take place immediately; as in *Goodright v. Cornish*, 1 Salk. 226., and 1 Eq. Abr. 189.; *Scatterwood v. Edge*, 1 Salk. 229., which follows the other in 1 Eq. Abr. As to the main point in those cases, it has been since over-ruled in *Chapman v. Blisset*, Ca. Temp. Talb. 145. It would be no stretch of construction to say that this was a gift to *Mrs. Robinson*, in case there was no person to take preferably under the appointment: but, even against the intent of the party, where the first limitation fails, the second shall take place. Mr. *Graham* contends, that even if the provision had been explicit to children and grandchildren, it would have been bad: but he cited no case to support this position. He referred to the case of *Humberston v. Humberston*, 1 Wms. 332., where the limitations were to persons unborn: but this power does not tie up the estate, it only makes *Dunn* tenant in fee, to dispose of it as he pleases, only among particular objects; and the estate is not kept so long unalienable as it might have been by a common settlement.

Lord Chancellor.— This bill proceeds on the idea, that the estate has not been well conveyed by the plaintiff's brother, and claims an equity to redeem. It contains two points; the first, relative to the execution of the power; the other, as to the question of election. If the whole had stood on the former point, I should have thought it cognizable at law: but the last clause of the will rendered it absolutely necessary to come into this court, and that the first point should be disposed of here. But it would be improper to decide that point in a court of equity, unless it could be upon clear and satisfactory grounds. Exclusive of the case of *Cavendish v. Cavendish*, which I could not follow without knowing it more correctly than I do, or contradict without more consideration than I have been able to give it, I know of no other case where it has been decided, that an appointment to grandchildren is a good execution of a [*] power to divide among children. If that case be so decided, I believe it is the first case to that purpose. On the first point, a question arises too important to the parties for me to decide, without more consideration; especially sitting in a court of equity; the question is, whether the limitation is good to the child, with a further limitation over to her children; which brings it to the same case as *Adams v. Adams*, where the children of the child were expressly mentioned. There has been no

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case decided, in which it has been held that the word children has been construed to extend to grandchildren; it must therefore turn upon some circumstance in the will, to shew the word children is to be taken in this unnatural sense. Such a gift has never been considered as a part of the bounty to the children. All the cases, I can recollect, appear to have been decided the contrary way, that the children take a part of the estate as purchasers. I take the rule to be, that the parts of the estate must vest in the persons who are the objects of the power. The next question is, supposing the intent to appear, that the limitation should be such, whether the limitation, in itself, would be legal. In the *Duchess of Marlborough's* case (5), the power was granted in *perpetuum*; it was to defeat estates, and revest them, and tended to an absolute perpetuity in *secula seculorum*. What is a perpetuity, but the extending the estate beyond a life in being, and twenty-one years after? That would have been the effect of this if done by devise; the question therefore is, whether by the intervention of a power, a grantor may extend the estate, beyond the rules of law, to what the law terms a perpetuity. A man may appoint 100 or 1000 trustees, and that the survivor of them shall appoint a life-estate, that would [not] be within the line of a perpetuity. (6) Then the question is, whether, such an illegal estate being interposed, it shall not be considered as a nullity, and the next estate be brought forward, and attached to the estate for life. The cases seem to support this doctrine; but not so clearly as for it not to deserve further consideration. Void uses have been held to support remainders, in order to serve the intention in wills; but the law has not carried the same construction in deeds. This is a will; the object of it is to execute a power: it must have therefore the favourable construction of a will, and you must consider the testator as intending, if the first use was bad, that the subsequent limitation should take place; though [*] this seems an extraordinary intent to attribute to him. There is a case of *Nichol v. Nichol*, which was sent by this court to the Common Pleas, and returned with a certificate: it was to the second son for life, and, after his decease, or in case he should become eldest, then to his second son, and his heirs-male. It was contended, that the limitation went beyond the rules of law, and could not take place as an executory devise. The Common Pleas held the estate not to be void, but vested in the second son, to preserve the general intent; and that he took to him and his heirs, determinable on their accession to the paternal estate. The questions in this case require more consideration; I can only retain the bill, and permit the parties to bring ejectments.

[*31.]

But it appearing the legal estate was in the trustees, his Lordship ordered a case, for the opinion of the court of King's Bench. (7)

(5) 3 Bro. P. C. 232. octavo edit. and 5 vol. 592. folio edit.

(6) See this observation referred to, and approved as unquestionable law by the Ch Bar, and by Lord Eldon C. in *Thellusson v. Woodford*, 11 Ves. 136, 137. 145.

(7) See the report of the arguments, &c. 2 T. R. 241. And see it on the equity reserved, *postea*, 344. The 3d edition refers for some material cases on Powers to *Bristow v. Warde*, *Wilson v. Piggott*, *Routledge v. Dorril*, and *Whistler v. Webster*, 2 Ves. jun. p. 336. to 372.

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BATTELEY against WINDLE. [28 January.]

(Reg. Lib. 1785. A. fol. 270 b.)

THE testator, by his will desired his brother would be executor and trustee for his sister *Batteley*, and her children, and gave him no legacy. (2)

Appointing an executor trustee, shall not take from him the residua. (1)

The question was, whether he should take the residue; Mr. *Scott* contending that by this will he was a mere trustee, and not entitled to the residue as an executor.

Lord *Chancellor*.—The question is, whether the word trustee shall alter the sense of the word executor? I think it must be taken *reddendo singula singulis*, and that he is a trustee only as to the trust-fund, and in other respects an executor.

His Lordship therefore decreed him the residue.

(1) *S. P. Pratt v. Stadden*, 14 Ves. 193. 199. *Quod vide*. Sir *W. Grant*, M. R., observes there, that the result in the principal case above is correct, although it is rather imperfectly stated.

(2) The will (as in Reg. Lib.) was as follows:—“First, I desire my debts and funeral expences may be paid as soon as can be; and then all my money in the funds
“I would remain and increase the interest to the principal so long as my brother
“*Charles B.* shall live, and, after his death, then I would give the interest from that
“time arising to my sister *Batteley*, to bring up and provide for herself and children;
“and at her death be parted amongst them equally, share alike: All my furniture I
“would have sent to my brother *Charles B.* And I do desire my brother *Richard*
“*Windle* to be my executor and trustee to and for my sister *Batteley* and her children.”
Reg. Lib.

It appears from Reg. Lib. that the defendant did not make the point by his answer; on the contrary, he submitted to account, and to transfer the balance in his hands as the Court should direct. His counsel, however, (as it seems) suggesting the point in his favour at the hearing, the Court declared him entitled to the residue of the testator's personal estate not specifically bequeathed. Reg. Lib.

[*] FORD against COMPTON. [7, 10, 13, and 22 February.]

[*32]

(Reg. Lib. 1785. A. fol. 204. b.)

IN a cause for specific performance of an agreement for a lease of an house, the bill called upon Dr. *Compton* to produce the original agreement, which was by letter from him, and an affirmative reply on the part of the plaintiff, and they gave him notice to produce the letter in reply, in order to read it at the hearing: and, to provide for his not producing it, they got a copy, which was in their own possession, stamped, in order to read that. At the hearing, Dr. *Compton* produced the original letter.

An original letter stamped, after production, to make it evidence. (1)
[Specific performance of agreement decreed upon an offer by letter, which was

forthwith accepted by another letter in reply. (2)]

(1) See *Hearne v. James*, *postea*, 309.

(2) The letter of the defendant offered the plaintiff a lease upon certain terms, and insisted on a reply by return of the post. The plaintiff notified his acceptance of those terms forthwith accordingly. The defendant afterwards granted a regular lease of the premises to another person, who was a party to the suit. The Court decreed the material defendant specifically to perform his agreement for a lease to the plaintiff, with costs to be paid by him; and it set aside the other lease, which he had so granted in fraud of his contract. Reg. Lib.

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against
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Mr. *Scott*, for the defendant, objected, that the copy could not be read, because the original was in court; and that the original letter could not be read, because it was not stamped; and he contended it could not now be stamped, because the twenty-one days limited by the act of parliament were expired.

Mr. *Mansfield*, for the plaintiff, said, the Court of Exchequer had determined, that, upon payment of the penalty, the instrument might be stamped, although the time was expired. If Dr. *Compton* had destroyed the original, this stamped copy would have been good evidence. The legislature, in forming the stamp acts, did not mean to alter the rule of evidence.

The plaintiff desired the cause might stand over to get the original stamped.

Lord *Chancellor* observed, that, if a stamped original was lost, it would be difficult to get a copy stamped.

But the cause stood over, and they got the original stamped, and produced it in evidence the next day.

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DOYLEY against The Countess of Powis.

[S. C. 1 Cox,
206. *quod vide*.]

(Reg. Lib. 1785. A. fol. 172.)

[A deposit made on opening a bidding having been laid out in the public funds, this deposit is considered as part of the purchase money paid, and therefore the depositor is not entitled to the dividends accruing between the time of the deposit and the completion of the purchase; but only to interest on the deposit at 4 per cent. (1)]

A Sum of 2000*l.* was deposited, by Lord *Beauchamp*, upon an opening of a bidding, upon the sale of an estate in this cause, and had been by order laid out in the funds. The [*] stocks rising, Lord *Beauchamp*, who is ordered to complete his purchase, claims the advantage of the rise in the payment of his purchase-money, the money paid in being only a pledge.

But Lord *Chancellor* said, the difference was where money was a mere pledge, and where it was part of the purchase-money, which it was here; and if there had been a loss, the purchaser could not have been called upon to pay more than his purchase-money. (2) When the money is paid in, it becomes part of the purchase-money.

A similar order had been made in the case of *Ambrose v. Ambrose*, on the 5th of *December* last. (2)

(1) See *Poole v. Rudd*, post. 3 vol. 49. And see in *Smith v. Jackson*, 1 Madd. Rep. 621. and the Report 1 Cox, 206.

(2) And see also *Poole v. Rudd*, post. 3 vol. 49. and 1 Madd. Rep. 621.

*Lincoln's Inn
Hall, 28th Feb.*

GLOVER against STROTHOFF.

question
whether an in-
terest in a
heritable bond
charged upon
lands in Scotland,

MARY BURGESS seised and possessed a considerable real estate, consisting of several sums of money secured on heritable bonds, according

lands in Scotland, will pass by will; referred to the Master to report the law of Scotland.

A bequest that 4000*l.* and a further sum of 1500*l.* shall pertain to J. P. after the death of R. G. without lawful issue is too remote, and the whole shall vest in R. G. (1)

(1) See Lord *Loughborough*'s approbation of this case in *Chandless v. Price*, 3 Ves. 101. Upon the points, see *Attorney General v. Hird*, and *Rigge v. Bensley*, ante, 1 vol. 170.

according to the laws of *Scotland*, and a considerable personal estate, did make her last will and testament in writing, duly executed and attested for passing real estates of inheritance, to the effect following: " Know all men by these presents, I, *Mrs. Mary Burgess, of Bulls Cross*, in the county of *Middlesex*, widow, being perfectly satisfied of the friendship, fidelity, and fitness of the persons after mentioned, for executing the following trusts, do, by these presents, assign, convey, and dispose to and in favour of *Richard Glover, of James Street, Westminster*, my brother (since deceased and other trustees), and to the survivors or survivor of them, and to the heirs of the last survivor; but in trust always for the uses and purposes after mentioned, all and whatsoever lands, heritages, debts, sums of money, government stock, and all other real and personal estate and effects, household-furniture, jewels, plate, watch, china, and others whatsoever, pertaining to me, or that shall be resting, owing, or pertaining to me at the time of my death; and particularly, and without prejudice to the aforesaid generality, the sum of 6000*l.* sterling, being part of the sum of 25,000*l.* contained in an heritable bond and disposition upon the estate of *Kilhead in Scotland, by Alexander Macknochie in Edinburgh, to [*] the said Richard Glover, Joseph Banks of Lincoln's Inn, and Archibald Douglas of Douglas, Esquires; to which bond, to the extent of the said 6000*l.* contained, I have a right by declaration of trust from the said Richard Glover, Joseph Banks, and Archibald Douglas, and also the sum contained in an heritable bond and disposition by James Robertson, Esquire, of Earnock, to the said Christopher Strothoff, Thomas Lewis, and Richard Heaton, secured upon his estate at Earnock: to which bond, and sums of money therein contained, I have a right by declaration of trust from the said Christopher Strothoff, Thomas Lewis, and Richard Heaton, with full power to my said trustees, immediately after my death, to enter into possession of my whole real and personal means and estate and effects, and to apply the same, and the prices thereof, to the ends, uses, and purposes following, (viz.) in the first place, for the payment of all my just and lawful debts, and funeral expences." She here gave some specific legacies and annuities. (2) " And further, I hereby appoint my said trustees to lay out at interest, upon real and personal security, as they shall think proper, the sum of 4000*l.* sterling, part of my said real and personal estate, and to make payment of the interest of the said sum of 4000*l.* only, to *Richard Glover, the younger son of the said Richard Glover, during all the days of his natural life, and to make payment of the principal sum, itself, to the heirs to be lawfully procreate of his body; but declaring that the above interest shall not be affectable by the debts or deeds of the said Richard Glover: and, in the event of his death, without lawful issue of his body, or of his selling, assigning away, or otherwise disposing of, the above interest, or any part of it, my will is, that the said sum of 4000*l.* together with 1500*l.* sterling further, making in all the sum of 5500*l.* sterling, shall pertain and belong to the Reverend John Henry Williams, vicar of Wellsbourne. And, further, I hereby appoint, that the sum of 12,000*l.* sterling, contained in the two heritable bonds above mentioned, on the estates of *Kilhead and Earnock,***

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170. 187, &c. with the various references, especially to *Kirkpatrick v. Same*, 13 Ves. 476, &c. *Barlow v. Salter*, 17 Ves. 479, &c., and *Elton v. Eason*, 19 Ves. 73, &c.

(2) Mr. Cox's note contains the following addition:—" And amongst others she gave 'to *Mary Williams* 50*l.*, and in the event of her death before me, to make payment to *John Henry Williams*, her son, of the sum of 30*l.*, and the sum of 500*l.* to *Henry Williams*, the son of the said *John Henry Williams*, and my godson.' Mrs. Williams survived the testatrix, but the 500*l.* was given up as clearly belonging to *Henry Williams*. She then proceeded thus:" (ut *supra*.)

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"do continue with my said trustees, for the uses and purposes following, (viz.) one-third part of the interest of the said sums to be paid to the said Richard Glover, of James Street, Westminster, my brother, and the remaining two-thirds to my said sister Elizabeth Strothoff, during their joint lives, and the whole of the said interest to the survivor of them during the natural life of the said survivor; and, after the death of the last liver of my said brother and sister, [*] I appoint the whole of the said interest to be paid to the said Richard Glover, my nephew, during all the days of his natural life, and the said principal sum of of 12,000*l.* itself, thereafter to pertain and belong to the heirs of the body of the said Richard Glover, declaring, at the same time, that no part of the above interest shall be affectable by the debts or deeds of the said Richard Glover the younger; and, in the event of his selling, assigning away, or disposing of the above interest, or any part of it, my will is, that the sums of money above mentioned, principal and interest, shall immediately thereafter fall to the next heir, in the same manner as if the said Richard Glover was naturally dead; and, in the event of his the said Richard Glover's death, without heirs of his body, I hereby appoint 6000*l.* part of the said sum of 12,000*l.* to pertain and belong to John Plumtree, Esquire, junior, of Jermyn Street, and the like sum of 6000*l.* to pertain and belong to Mary Plumtree, daughter of John Plumtree, Esquire, of Jermyn Street, and their heirs for ever. I hereby appoint the whole remainder of my fortune and estate subject to the payment of the said annuities, to be paid to the said Mrs. Elizabeth Strothoff, my sister, to be disposed of by her as she shall think proper, notwithstanding her said coverture: and my mind and will is, that the same shall not be subject or liable to the controul, debts, or engagements of her present, or any after-taken husband." Mary Burgess, some time afterwards, made a codicil to her will, not executed in the presence of witnesses, and which contains the following clause: "I revoke that part of my will, wherein I have left my brother Richard Glover one-third part of the interest of the heritable bonds upon the estates of Kilhead and Earnock, and leave only a sixth part of the interest to him."

Three questions arose upon the construction of this will. 1. Whether the remainder over of the 4000*l.* and the legacy of 1500*l.* after the death of Richard Glover, without issue of his body, were not too remote. 2. Whether, according to the law of Scotland, the heritable bonds could pass by this bequest. 3. Suppose the bequest to be legal, whether the remainder over to the Plumtrees was not too remote.

Mr. Mansfield, Mr. Caldecott, and Mr. Stratford, (in support of the limitation,) argued, — That it was good, from the manifest intention of the testatrix, that it should take place upon the [*] event of Glover's dying without leaving lawful issue; that, wherever this was pointed out by the devise, it was good; and slight circumstances had been relied upon, as sufficiently marking that intention: for this purpose they cited *Keily v. Fowler*, 6 Bro. Parlt. Cases, 309. *Higgins v. Dowler*, 1 Wms. 98. *Stanley v. Leigh*, 2 Wms. 686. *Butterfield v. Butterfield*, 1 Ves. 133. (9) *Daw v. Pitt*, Fearn, 347. With respect to the 1500*l.* they insisted that was a legacy in *præsenti*, merely coupled with the reversionary interest, and was not to wait till that time.

Mr. Solicitor General (for Richard Glover, the heir at law, and to whom the testatrix had devised the interest of the 4000*l.* and the 12,000*l.* the heritable bonds). — As to the 4000*l.*, he insisted it was an estate-tail in money, executed in Richard Glover, the first taker, Butter-

(3) See the statement in *Butterfield v. Butterfield*, rectified in Supplement to Vesey, sen. p. 81.

field

field v. Butterfield, Daw v. Pitt. That the case was too strong to admit of circumstances of the intent of the testatrix to contradict it. As to the 12,000*l.* no doubt the will was executed according to the statute of frauds; but, by the law of *Scotland*, which must operate upon this occasion, an heritable bond is real estate, and not deviseable; feoffment is to be given, or may be demanded at a day certain. Livery is demanded by the obligee; and the words of the bond are not to the obligee, his executors, administrators, and assigns, but to his heirs and assigns. In such a case it becomes real estate, and descendible to the heir, unless properly disposed of *inter vivos*.

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[(4) It is true the bond is on a trust; but the] declaration of trust does not operate as a real assignment; the declaration is only to [the obligee, her] heirs and assigns; the parties are nothing more than trustees for the heir. This declaration of trust is merely for a part of it, the sum being 25,000*l.* and the land is bound by adjudication, *Willock v. Ouchterlony*, in the House of Peers, 1772, No. 18. there a merchant of *London*, concerned in property of this nature, had procured a declaration of trust *inter vivos*, reserving to himself a power of revoking the trust, which he did afterwards by will, and bequeathed this property to certain parties. This was a scheme [*] to get rid of the *lex loci*, and it was contended, the property passed *quasi uno flatu*, that the deeds and the will operated as one instrument. But it was answered, and affirmed by the decree of the House, that it could not pass, unless it had been disposed of *inter vivos* by the proper deed of disposition, according to the laws of *Scotland*. This being the case, he submitted that an enquiry before the Master as to the *lex loci* ought to be directed: to which the Chancellor consented, and referred it to the Master to enquire, whether, by the law of *Scotland*, the 12,000*l.* so secured is considered as heritable, and descendible to the heir, or whether a sufficient disposal has been made of this property by the will of the testatrix.

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Mr. *Madocks* (for the residuary legatee Mrs. *Strothoff*, and who is interested in the remainder of the interest of the 12,000*l.* heritable bonds,) cited Lord *Annandale's* case, 2 Vesey, 381. where 30,000*l.* were secured upon *Scotch* lands by act of parliament, instead of *English* lands, and *Thorne v. Watkins*, 2 Vesey, 35. to shew, that notwithstanding it was real by the law of *Scotland*, yet, by our law, it was merely personalty.

Lord Chancellor. — With respect to the 4000*l.* personalty, the cases of *Butterfield v. Butterfield*, and *Daw v. Pitt*, have confirmed the doctrine upon that subject, that it is too late now to argue upon the distinction of principal and interest, or to insist upon circumstances of the intent. The rule must take place. With respect to the 1500*l.* I am afraid *Richard Glover* must also take that. However clear the intent of the testatrix might be, she has expressed it in very awkward and unapt terms, and I cannot make her will for her.

His Lordship therefore decreed the remainders over too remote; and the question concerning the law of *Scotland* relative to the heritable bonds stood over till after the Master should have made his report.

(4) There is an alteration in the text here from the notes of Mr. Cox.

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[*] PETER PIERSON, Esq. Residuary Legatee of JOHN GARNET, D. D. late Bishop of CLOGHER, in the Kingdom of IRELAND, and one of his Executors, - - - Plaintiff.

RACHAEL GARNET, Spinster, only Sister and Heir at Law of the said JOHN GARNET and others, Annuitants, under the Will of the said JOHN GARNET, and several Descendants of ANNE COPPINGER, - - - Defendants.

Rolls, 6 March, 1786.

[*Vide* S. C. Finch, Prec. Chanc. 201, &c.]

[10 February and 6 March.]

(Reg. Lib. 1785. B. fol. 410. b.)

Words of desire will raise a trust where the property and object are certain. (1)

Legacies, no fund being described, to be paid in the currency of the country where the will is made. (2)

The description of children of A. does not extend to a child in ventre *se mere*. (3)

A daughter, though eldest, held a younger child to take a legacy by description.

JOHN GARNET, late Lord Bishop of *Clogher*, by his will dated 12th October 1780, gave his personal property to *Samuel Salt*, Esq. in trust, to pay to several of the defendants, annuities stipulated in his said will, and went on as follows: "And, subject to the said annuities, it is my will, that the said *Samuel Salt*, his executors, administrators, and assigns, shall and do pay, or permit and suffer, my kinsman *Peter Pierson*, of the *Inner Temple, London*, Esq. to receive the whole of the residue of the proceeds, interest, and profit of the said fund, so to be placed out at interest, after the payment of the said annuities, for and during the term of his natural life, with the full benefit of the said annuities, if they, or any of them, shall cease during his life; and, from and after the death of the said annuitants, I bequeath the said residue to the said *Peter Pierson*, his executors, administrators, and assigns: and it is my dying request to the said *Peter Pierson*, that, if he shall die without leaving issue, living at his death, that the said *Peter Pierson* do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt *Anne Coppinger*, his grandmother, in such manner and proportion as he shall think proper."

The principal question was, whether the terms used in the recited clause were recommendatory only, or imperative, and raised a trust for the descendants of *Anne Coppinger*.

(1) The decree on this point affirmed, on appeal, by Lord *Thurlow* C., *post*. 226. For the authorities on this head, see the Editor's notes to the cases of *Wynne v. Hawkins*, and *Harland v. Trigg*, *antea*, 1 vol. 142. 179. Upon the principal case, &c. on this point, see in *Matin v. Keighley*, 2 Ves. jun. 533. *Pushnan v. Filditer*, 3 Ves. 9. *Brown v. Higgs*, 5 Ves. 504. and 8 Ves. 573, 574., where Lord *Eldon* C. says (*inter alia*), — "Mr. *Ambler* and myself were not quite satisfied with that decree, and it came before Lord *Thurlow*: but the opinion of my younger days is not that which I now hold." See also *Morice v. Bp. Durham*, 10 Ves. 536.

(2) The point as to what interest was to be allowed on these legacies was not argued in the case. See in *Malcolm v. Martin*, *post*. 3 vol. 53. and in *Bourke v. Ricketts*, 10 Ves. 334. It thence appears, although it is unnoticed in this report, that Lord *Kenyon*, M. R., gave interest at 4 per cent., agreeably to the common course of the Court. Sir *W. Grant*, M. R., determined, in *Bourke v. Ricketts*, 10 Ves. 330., in like manner, that although the legacies were to be paid in the currency of the country where the testator resided, yet there being assets in each country, and the legatees living in England, they were only entitled to English interest.

In the principal case, the decree (as in Reg. Lib.), after the usual direction, that the Master was to allow interest at 4 per cent. on the general legacies, proceeded thus: — "But as to such legacies as in the said will and codicil as are not expressed to be payable either in English or sterling money, his Honor doth declare that the same are to be considered as payable according to the value of Irish currency," without any further directions in respect of interest: so that of course they would have interest at the common rate of 4 per cent. under the usual direction above noticed. R. L.

(3) See also *Cooper v. Forbes*, *postea*, 63.

There

There were three accessory questions.

[*] 2. Several legacies being expressly to be paid in *Sterling*, or *English* money, and others indeterminate as to the fund, and the will made in *Ireland*, whether these legacies should be paid in *Sterling* money, or *Irish* currency.

3. *Henry Burgh*, who claimed as one of the descendants of *Anne Coppinger*, having been born since the testator's decease, whether he could claim under the will.

4. One of the legacies being to the younger children of *A.* who had a daughter, but also a son younger than the daughter, which of these should take.

The Reporter did not hear the opening for either the plaintiff or defendant, but understands that it was argued by Mr. *Ambler*, Mr. *Scott*, and Mr. *Clifford*, for the plaintiff; Mr. *Price*, Mr. *Selwyn*, Mr. *Robinson*, and Mr. *Graham*, for the defendants, to the general effect following:

With respect to the first, and most material question, the plaintiff's counsel contended, that the words were merely recommendatory. Mr. *Ambler* and Mr. *Scott* attempted to argue, upon the interpretation of these words, as being equivalent to *peto, rogo, fidei tuæ committo*; insisting that the words *dying request*, amounted only to an earnest wish of the testator, but nothing further; that they were not strong enough to raise a trust according to the notions of the civil law.

His Honor seeming inclined to lay out of the case the civil law, wished it to be argued upon the principles laid down in former cases. The counsel, in consequence of this, contended that the rule laid down, and adhered to by the court, was, that there must be a *certainly of the gift, and of the object*, to whom it is given. As to the gift itself, it was sufficiently marked; but as to the objects, there could be no certainty whatsoever. It was difficult to decide, whom the testator meant by descendants; whether those that were living at the time of making his will, at his own death, or those born after, or those who should be in *esse* at the death of *Peter Pierson*: it was so [*] difficult to determine who the particular persons intended were, that it would be impossible to decide the question.

His Honor seemed inclined to defer the question, as, *primò facie*, there seemed to be no occasion to go into it, until *Peter Pierson* should be dead without issue; but, being much pressed to decide, by the suggestions of plaintiff's counsel, of the disagreeable situation in which the plaintiff stood, not knowing how to treat this property, or how to settle, or dispose of it, without the direction of this court; his Honor waved his opinion, and consented to determine it. Mr. *Scott* said, that the will itself afforded an argument in favour of the plaintiff; that the interest and dividends of the residue, after payment of the annuities, were given to *Peter Pierson*, for his natural life; and then, after all the annuitants were dead, the capital was given to him absolutely. — The counsel cited the cases of *Harland v. Trigg*, ante vol. i. 142. and *Wynne v. Hawkins*, *Ibid.* 179. In *Harland v. Trigg*, the word *family*, was said to be a word of uncertainty; so is the word *descendants*: as to *Wynne v. Hawkins*, the words *not doubting*, were held insufficient to create a trust. With respect to *Nowlan v. Nelligan*, *Ibid.* 489. the property was not given to the holder of the fortune, but to the executors themselves. They also cited, *Hob.* 33. 2 Eq. Abr. 291. *Bland v. Bland*, 1745, *Le Maître v. Bannister*, 26 Nov. 1770, where the testatrix gave her fortune to Capt. *Roach*, and, if he should die without issue, *then she recommended it to him, to do justice to her daughter, if he should think her worthy of it; but, if any unforeseen accident should make the whole acceptable or serviceable to him, he may dispose of it if he should think fit.* It was held not to be an imperative bequest. In the present case, if *Peter Pierson* is not to have the absolute disposal, the bequest is nugatory;

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tory; though it is given to him, his executors, administrators, and assigns, it is impossible for him to use it as his own. The apparent clause upon the will is so absolute, that the court cannot force a trust upon the legatee.

With respect to the other question, as to the payment of the legacies, it was insisted, the testator had sufficiently shewn his intention, by excepting the two legacies of 500*l.* and [*] directing them to be paid in *Sterling* money. His residence being in *Ireland*, was also a strong circumstance to shew the same intention: and the case of *Saunders v. Drake*, 2 Atk. 465. was relied upon as in point. (4)

Mr. Price, Mr. Selwyn, Mr. Robinson, and Mr. Graham, for the defendants, insisted that this case was totally different from all the authorities cited; in all of them the power was in the first taker. If the matter were *res integra*, it might be very proper to resort to the *Roman* code; but, in the present state of judicial decisions, such a reference was totally unnecessary. That the words used here are sufficiently strong to create a trust, appears from the cases of *Eales v. England*, 2 Vern. 466. Pre. Ch. 200. *S. C. Harding v. Glyn*, 1 Atk. 469. *Buggins v. Yeates*, 9 Mod. 122.

With regard to the uncertainty of the objects, the descendants are undoubtedly all those who shall be living at the death of *Peter Pierson* without issue; as in the case of *Baldwin and Carver*, Cowp. 309. They may divide the property among them; the power left to *Peter Pierson* is apparent, and he may execute it without difficulty. With respect to the absolute gift to *Peter Pierson*, the preceding clause only gives it to him for life, and is a mark of the intention to control this property.

As to the payment of the legacies, the testator had left an *English* executor to manage his property here, and an *Irish* executor to manage that in *Ireland*, who, when he had so done, was to transmit the plaintiff's property to the *English* executor, in whose hands they were to be consolidated. This afforded an argument, that the legacies were to be paid in *Sterling* money.

Mr. Ambler, in reply. — There are two questions in this cause, one upon the *currency* in which the legacies are to be paid, the other on the interest Mr. Pierson takes in the residue. The first question is not an object to the plaintiff, but the authority of *Wallis v. Brightwell*, 2 Wms. 88. and *Phipps v. Earl of Anglesea*, 1 Wms. 696. shew the legacies must be paid in the *currency* of the country where the will is made. There is also a case in 2 Atk. 465. to the same effect.

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[*] His Honor interrupted Mr. Ambler, by saying he was tied down by the authorities.

Mr. Ambler. — Then as to the words, whether they are sufficiently imperative to raise a trust. In order that they should be sufficient for that purpose, the intention must appear either by the words themselves, by the object to which the testator applied them, or upon the face of the will. There has been no case determined on these words: "It is my dying request." The word *request* denotes free will in the person taking the legacy. It is rather a stronger word than *desire*, but still leaves it in the breast of the party taking to do the act or not. It would be extraordinary, if such words should be construed as if he had raised an express trust. The cases upon the subject are *Harland v. Trigg*, *Wynne v. Hawkins*, *Bland v. Bland*, the Countess of *Bridgewater v. Duke of Bolton*, 1 Salk. 236.

As to the purposes of such a trust, they will make a difference in the construction; for, where such words occur, and the purpose is for the payment of debts, it is held a trust, the object making it so. In such a case, even the word *recommend* will constitute a trust: but the objects

(4) See Mr. Sanders' note.

here are the descendants of Mrs. *Coppinger*, who are very numerous, many of them unknown to the testator, and of whom many more may be born during Mr. *Pierson's* life-time. They are not objects of the testator's bounty; he has left it in Mr. *Pierson's* discretion what proportion he will give to each. This leads to the consideration, whether it appears, from the whole will, to be the testator's intention to raise a trust.

In *Cunliffe v. Cunliffe* (5), before the commissioners in 1770, it was a devise of a sugar-house, to the testator's nephew *Ellis Cunliffe*, and, in case his nephew should die without issue, the testator recommended it to him to give it to his brother. The court was of opinion that it was not sufficient to raise a trust. It is true, it has been said, that, in that case, the question turned upon the word recommend; but, I say, it was upon the general circumstances of the case; for the word *recommend* would have been sufficient had the trust been for the payment of debts.

[*] *Bland v. Bland*, in 1745, shews, that wherever the first gift is of the absolute property, such a recommendation following it shall not raise a trust. In that case, Lady *Bland* gave the estate in question to Sir *John Bland*, and earnestly requested, that in case he should die without issue, he would dispose of the estate, or of so much thereof as he should die seized of, so that the estate might be enjoyed by her daughter. It was held to be no trust, inasmuch as the words, *so much as he should die seized of*, shewed he might dispose of the whole; and that it was like the case of *Attorney-General v. Hall*, Fitzg. 314. In both these cases, the whole was given absolutely; and, in this case, the whole is given absolutely and emphatically to *Pierson*. It is not doubtful that he meant to give the whole; for he has mentioned his *executors, administrators, and assigns*. Nothing remained in the testator to be given over. In the Countess of *Bridgewater v. the Duke of Bolton*, the devise was to the devisee, to be given by him to his children, if he should think proper: it was held to be a fee in the devisee. In the present case, it is highly improbable that the testator meant a trust. Mr. *Pierson* appears to be the sole, or at least the chief object of his bounty. He was with him in *Ireland*, and had been abroad with him, and the testator had taken him from the profession of the law: but, if Mr. *Pierson* should have no children, it was then the testator's wish that he should dispose of it among the descendants of *Anne Coppinger*, many of whom the testator could not know, and many might be born during Mr. *Pierson's* life-time.

The Lord Chancellor, in , laid great stress on the testator's having given legacies to the persons for whom the trust was to be raised. In this case, the testator has not directed Mr. *Pierson* to give any specific sum to any of them. Here is no trust in Mr. *Pierson*, in case he should have children. It is extraordinary there should be a trust if he had not, and none if he had. The construction will make the testator act absurdly; for, having a regard to Mr. *Pierson*, he will have given him no power to make a settlement. Upon the death of the annuitants, on this construction, the trust in *Salt* will expire; but a new trust will commence in Mr. *Pierson*, in case of his dying without issue. Another reason against this operating as a trust, is the uncertainty and impracticability of the devise. I do not mean an uncertainty in the words, which are [*] just as certain as family or relations; but an uncertainty in point of execution as a trust. It is from this sort of uncertainty, that the court has always said the word *relations* shall mean next of kin. In this case, the persons will be equally numerous and uncertain; it therefore could not be intended as a certain trust. The word *family* has been held, in *Harland v. Trigg*, to mean nobody. In *Wynne v. Hawkins*, Lord *Thurlow* said he had de-

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cided that case upon the uncertainty of the object. There is no case where the word has been *descendants* except one, where its signification was laid down by the † additional words *living near Seven oaks in Kent*. So, in ‡ General *Honeywood's* case, the words were relations *who should claim within two years*. With respect to the impracticability of the devise, it is sufficient to shew that it may be impracticable. Who are the objects? the descendants living at the making of the will, at the death of the bishop, or of Mr. *Pierson*? If at the making of the will, or the death of the bishop, are they to be entitled upon surviving Mr. *Pierson*? In order to be construed a trust, it must be such a one as Mr. *Pierson* could execute without the assistance of a court of equity: yet here Mr. *Pierson* is expected to find out all the descendants, and to give something to every one of them. If he cannot execute the trust, it never could be intended as such. Suppose Mr. *Pierson* should make no disposition, is the whole world to be searched over for descendants of *Anne Coppinger*? There is another difficulty; he is under the necessity of giving something to every one; if he does not, the whole will be void, *Menzey v. Walker*, Forrest. 72. If it was among the descendants of his grandfather, it would be the same thing. In *Eales v. England*, Pre. Chan. 200. 2 Vern. 466. the first taker had only an estate for life given to him. In *Harding v. Glynn*, 1 Atk. 469. it was clearly a power; it was to give it to such of his relations as she should approve. *Nowlan v. Nelligan* is not like this; the property was given to the trustees, not to the tenant for life.

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Master of the Rolls (after stating the case).—There are four questions arising upon this will. 1st. Whether the clause is to be considered as imperative upon *Pierson*, so as to create a trust: and under which the descendants of *Anne Coppinger* [*] have an interest, which cannot be disappointed. 2d. Whether the legacies, which are indeterminate as to the fund, are to be paid in sterling money, or in the currency of the country where the will was made. 3d. The third question (which was raised by Mr. *Bumstead*) in behalf of the child in *ventre sa mere*, whether he is entitled to a share of the legacy given to the children of *Burgh*. 4th. Whether the daughter could take as a younger child, as there was a son younger than her who was heir-apparent.—As to the first, which is the most material question, if it is one of those duties of imperfect obligation (as the civilians term them) which bind the moral character of men, but where courts of justice cannot interfere, it will not entitle me to do it, or to go beyond those rules which have bound courts of justice. It is better to go upon the principles by which others have decided, than to vary from them, by spelling out little circumstances in a case, as the ground of determination. The principles appear to be those which are recognized by Lord *Thurlow*, in the cases of *Harland v. Trigg*, [*antea*, 1 vol. 142.] and *Wynne v. Hawkins*, [*antea*, 1 vol. 179.] that where the property to be given is certain, and the objects to whom it is given are certain, there a trust is to be created. And it would be a lamentable case, if this court were to raise a distinction upon slight words, such as *peto*, *rogo*, *fidei tuæ commendo*, and such expressions of the civil law; and if the decisions of cases were to turn upon such grounds, property would be very vague. The principles were not first laid down by Lord *Thurlow*, but extracted by him, with great wisdom, from those on which preceding Chancellors have decided questions of this nature. I wish to refer to a case which I have not heard cited, *Richardson v. Chapman*, which was first heard before Lord *Northington*,

† *Crossley v. Clare*, 11 April, 1761.

‡ [Ambler, 708.] *Vide antea*, vol. 1. p. 33.

and

sterwards in the House of Lords. † It is accurately stated in *rn's Ecclesiastical Law*, tit. *Bishops*, which says, that, in this a request in a will is, at this day, imperative; "*but there ought a particular person named, and pointed out.*" Let us see whether it be supported by the cases, or whether it be impugned by any. It is sufficient to refer to *Harland v. Trigg*, and *Wynne v. Hawkins*: respect to the other cases cited, there is one very apposite to the point; it is 2 Eq. Abr. 291. *Palmer v. Scribb*, where similar to those used in this case were held too general to amount to a trust. Though this book is not a book of the first authority, I must be aided by such cases as stand in point there; [*] and particularly, the case which contains so much sense as induces me to rely upon it, in conjunction with the other authorities. With respect to the authority cited on the other side, *Bland v. Bland* falls within the rule. The result was not certain, being the whole of what he should be seised of at death, and leaving him an absolute control over the property during his life. The case of *Cunliffe v. Cunliffe* breaks in upon my argument; and I admit, the decree I shall pronounce is in contradiction.

It would be absurd to lay a stress upon *recommend* in the one case and not upon *it is my dying request* in the other. The ground upon which I get rid of that case is, that the Lords Commissioners, in giving their opinion, rested upon *Bland v. Bland*, and upon *Pynsent v. Pynsent*. This latter is not found, but, upon the note we have of it in *Bland*, we may say that case was not like *Cunliffe v. Cunliffe*. The duty of the property, though one of the *sine quâ non*s, was wanting.

Glynn v. Harding, it goes the whole length of the present case. The reasons are not fully reported by *Atkyns*, but the words were, *I direct*, and they were held imperative. Therefore, where the circumstances, of certainty of the property, and of the object to whom it is to be conveyed, concur, all the cases warrant me in saying it is a trust, except the case of *Cunliffe v. Cunliffe*, which cannot be relied upon for the reasons mentioned. In *Le Maître v. Bannister*, the words were, "to do justice to the children; but, if any circumstances should occur to make it necessary, the devisee was to be at liberty to dispose of it." There, one circumstance was wanting; for the devisee could dispose during his life. Mr. *Ambler* has pressed the difficulty, and impracticability of carrying the trust into execution. That argument has no weight with me, because, if an express trust had been raised, it must have been executed, though it would have been attended with all the same difficulties and impracticabilities stated in this case. However arduous the task was, the court must have carried it into execution. The argument being once given, it cannot be given over, upon the reason that a trust cannot be mounted upon a fee, is begging the question; for words creating a fee have, in innumerable cases, been cut down by subsequent words to an inferior estate. I think no stress can be laid on the words *trustors, administrators, and assigns*: it would be equally reasonable to rest upon the former express estate for life. [*] These reasons and authorities induce me to pronounce, that the words are imperative, and create a trust in favour of the descendants of *Anne Coppinger*.

As to the 2d question, the cases Mr. *Ambler* has cited are conclusive. Ever the will is made, the legacies must be paid in the currency of the country; unless the testator had made a separate distribution of his English and Irish property. (6) I therefore declare that the unascertained legacies must be paid according to Irish currency.

† 5 Brown's Parl. Cases, 400. [7 vol. 318. octavo edition.]

Vide Saunders v. Drake, 2 Atk. 465. and Mr. Sanders' notes. *Et vide Pipon v. Ambler*, 25. and *Malcolm v. Martin*, post. 3 vol. 50.

1786.

PERSON
against
GARNER.

[*46]

[*47]

Upon

1786.

PIERSON
against
GARNET.

Upon the 3d question as to the child *in ventre sa mere*, I am of opinion, against Mr. *Bumstead's* client, that, according to Lord *Hardwicke's* reasoning in *Ellison v. Ayrey*, 1 Vesey, 111. the child not being *in esse* at the time, cannot take the legacy.

In respect to the 4th question in behalf of the eldest child, being a daughter, many cases have decided, that a son who takes the estate, though not so by *primogeniture*, shall be held an eldest child, 2 Vesey, 210. is in point to this; the daughter therefore, though eldest, shall take as a younger child. (7)

(7) See also *Heneage v. Hunloke*, 2 Atk. 456.

Lincoln's Inn
Hall, 28th
March.

Bankrupt's
petition for a
meeting to
take his sur-
render dis-
missed. (1)

Ex parte WHITE in the Matter of WHITE.

THIS was a petition by the bankrupt, praying that the Chancellor would appoint a meeting of the commissioners that he might surrender; and stating, that, a few days before he was declared bankrupt, he was obliged to go abroad for his health; and that, from the time of his hearing of the commission till he came over, he had been extremely ill. It was a partnership bankruptcy, and the two other partners surrendered in time.

When this petition came on before, Lord Chancellor ordered it to stand over to see what the assignees had to say. They now appeared by counsel, and did not oppose the prayer of the petition; but made an affidavit, that the bankrupt had been seen a few days before he went abroad, apparently in good health; [*] and that the son of the bankrupt had, at the last meeting, said the petitioner would not surrender.

Lord Chancellor. — Ordering the commissioners to appoint a meeting, that the bankrupt might surrender, would not avoid the effect of the statute. It only has the effect of declaring the opinion of the court, that the bankrupt had no intention of keeping out of the way fraudulently. But my opinion in this case is, that he did purposely keep out of the way, and that he is perjured when he says he went abroad for his health.

Petition dismissed.

[*48]

(1) If the bankrupt has neglected to surrender by an *innocent* default, the Lord Chancellor will order that the Commissioners be at liberty to appoint a new day for his surrender. Fuller's case, 10 Ves. 183. and *Ex parte Higginson*, 12 Ves. 496. But such order does not clear the bankrupt from the felony under the statute, except as it shews the Lord Chancellor's favourable opinion of the case. *Ex parte Johnson*, 14 Ves. 40. *Ex parte Jackson*, 15 Ves. 119. See also *Ex parte Grey*, 1 Ves. jun. 195.

Ex parte ADAMS in the Matter of WILKS.

PETITION to stay a certificate, in order to give a creditor an opportunity of proving his debt. The petitioner did not account for not having applied before; upon which the Chancellor dismissed the petition.

1786.

Ex parte GRAHAM in the Matter of GRAHAM.

PETITION by a bankrupt for an order to the commission to appoint a meeting to receive the bankrupt's further examination.

The Lord Chancellor had before made an order for the commissioners to appoint a meeting, that bankrupt might surrender and be examined; and when he applied before the commissioners, they were dissatisfied with his answers, and committed him. He now states, that he has recollected circumstances more particularly, and is desirous to complete his examination, and be discharged out of custody; but the commissioners refuse to appoint a meeting.

[*] The assignees opposed the prayer of the petition, so far as it required the expence of the commissioners' meeting to be paid out of the estate, alleging, that as this extraordinary expence arose from the bankrupt's own misconduct, he ought to pay it himself.

Lord Chancellor. — It is a commitment, till conformity; the form of the commitment is conclusive. The meeting must be at the expence of the estate. The bankrupt has no estate, or is supposed to have none.

The commissioners must appoint a meeting.

Petition to appoint a meeting for bankrupt's surrender and examination, after the commissioners had been dissatisfied with former answers allowed. — Expenses out of the estate.

[*49]

Ex parte BOULD in the Matter of BOULD.

PETITION to order the commissioners to appoint a meeting for the bankrupt to surrender; the bankrupt made an affidavit, that a commission was taken out against him and his partners on the 5th January; that he left his house on the 3d January, and on the was taken ill in London, and had been confined to his bed ever since. That a few days before the last meeting, he procured his apothecary to write to the solicitor under the commission, and tell him the circumstance, and request his advice how to act. The solicitor wrote an answer, that the petitioner must apply to his attorney, who would tell him how to proceed.

The bankrupt did not receive this letter till the time for the last examination was over. This affidavit stated, that his partners had surrendered, and all the effects were in possession of the assignees, and that he had not any of the effects himself.

The assignees appeared by counsel, but neither opposed nor consented.

Lord Chancellor made the order.

On illness a similar order.

[*] *Ex parte LONG.*

[*50]

A DIVIDEND had been declared, and paid to such creditors as proved.

This was a petition by other creditors, to be paid as much out of the bankrupt's effects, as would make them equal to those creditors who had proved previous to the declaring a second dividend.

After a dividend, creditors proving debts, are ordinarily, to take only *pari passu*; but if the assignees

have paid other creditors, equal to those who have proved; they ought to do the same with those who apply.

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Ex parte
PAGET.

Lord Chancellor said, — When creditors, who have not received a former dividend, go before commissioners, in the first instance, to prove their debts, they should only be paid future dividends *pari passu* with the other creditors. But where they apply to the court, in the first instance, it is incumbent upon them to make out a ground for not having come before, a special representation of circumstances, which circumstances create a peculiar justice to extend the rule further than *pari passu*. His Lordship ordered it to stand over for further affidavits; but it being urged that the assignees had paid other creditors, equal to those who had proved, he said he took the law to be, that if a debt is proved after a dividend, the creditors are to take *pari passu*; but if the assignees have been in a habit of paying otherwise, they must do it without order: and dismissed the petition.

Ex parte PAGET.

LORD Chancellor held, that commissioners, in the country, could not, on any account, take more than 20s. for their attendance, and ordered charges beyond that sum to be struck out of the bill.

[*51]

[*] EASTER TERM,

26 Geo. 3. 1786.

[Vide S. C. on
Bill of Review,
2 Ves. jun.
698, &c.]

PITT against JACKSON. [5th, 6th, and 8th May.]

(Reg. Lib. 1785. B. fol. 705. b)

Master of the
Rolls for Lord
Chancellor.

Purchases were
to be made with
the trust-mo-
ney, but no
time limited.

BY settlement, previous to the marriage of *Pinckney Wilkinson* with *Mary Thurlow*, it was covenanted among other things, that part of the

The husband made a purchase (1), which he [by will declared should not be subject to the uses; the wife died, and no other purchase was made. The Court, on this occasion (1),] held, that the estate should not be so applied; but that the personal estate was liable for the breach of contract.

Under a power to appoint to children; an appointment to a child for life, with remainder to her children (2), is not valid, but the excess is void.

The whole shall not be considered as unappointed, but be appointed *cy pres*. (2)

The codicil revoking a legacy of 40,000*l.* the legacy in fact being only 30,000*l.* and 10,000*l.* an appointment, revokes the appointment.

A testator, at the time of making his will, is possessed of 7000*l.* navy bills; at his decease, he has a much larger quantity, he recites in his will that he had about 7000*l.* *quære* what sum shall pass; but referred to the Master. (3)

A transaction between a man and his wife as to the purchase of her separate estate, but not carried into effect, shall not now be so; but his personal estate shall account for rents and profits (4); and that estate descending, the children who take it shall elect, as between it and their claims under the will.

(1) Two bills of review were afterwards filed; under one of these, evidence was introduced (upon the foundation, as it seems, of what appears at the top of p. 34. *postea*;) from whence it appeared, that Mr. and Mrs. W. had executed a direction to the trustees of the fund that it should be invested in the estate which he had so purchased. This, of course,

the estate of *Mary Thurlow*, consisting of securities for money, amounting to 10,000*l.* and 5000*l.* paid by said *Pinckney Wilkinson*, together with 5000*l.* to be paid by him, within ten years, or, in case he should happen to die, by his executors, &c. within one year, should be laid out in the purchase of lands, to be settled to the use of *Pinckney Wilkinson* for life, without impeachment of waste, remainder to *Mary Thurlow* for life, in bar of dower, remainder to the use of the children of the marriage, subject to such powers, limitations, and provisos as *Pinckney Wilkinson* by deed, or will, should appoint, and, for want of such appointment then as *Mary Thurlow* should appoint, and in default of such appointment, to the use of their children, and in default of issue, to *Pinckney Wilkinson* in fee. — Before the purchase, the trustees had powers to call in, and replace the funds in which the sums were invested; which powers were executed by frequent removals of the stocks.

The trustees in this deed were all since dead, the executor of the survivor was before the court. By deed, bearing even date with this deed, *Mary Thurlow* had granted (in pursuance of the agreement between the parties) all her real estate, and covenanted to surrender her copyholds, and assured all her personal estate (save the securities aforesaid) to trustees to her sole and separate use, and disposal.

[*] The marriage took place, and there were several children, who all died under twenty-one, during the life of the husband and wife, except *Mary*, the wife of — *Smith*, and *Ann*, the wife of *Thomas Lord Camelford*.

Mary married — *Smith*, in the life-time of the father and mother, without their consent; in consequence of which, they gave no portion upon her marriage: of that marriage there are issue four children, who are defendants.

Pinckney Wilkinson in 1752 purchased of the heirs of *Evirilda Thornhill*, for the sum of 16,300*l.* the manor of *Polestead Hall*, otherwise *Westgate* in *Norfolk*, and other premises, which were conveyed to *Mark Close*, as a trustee for *Pinckney Wilkinson*, his heirs and assigns. *Close* is dead, without making any conveyance to *Pinckney Wilkinson*: his eldest son, and heir at law, was before the court.

Pinckney Wilkinson, 1st August 1768, made his will, duly attested, to pass real estate, in which, after reciting the agreement on the marriage, that the &c. were to be laid out in real estate to the uses declared by the settlement, and reciting that he had received 10,000*l.* out of his wife's fortune, and had purchased the freehold estate in the County of *Norfolk*, amounting to more than 20,000*l.* but had not conveyed the same to the uses of his marriage settlement; and that it was not his intention that such estates should be considered as an investment of the 20,000*l.* trust money, but that the sum of 20,000*l.* and also the surplus of 861*l.* 14*s.* 9*d.* arising by the sale of the stocks in which 15,000*l.* of the said trust

course, occasioned a reversal of so much of the original decree, and a declaration agreeably to such joint direction. *Vide* S. C. on the Bills of Review, 2 Ves. jun. 698. 701. 715. under the name of *Smith v. Lord Camelford*.

(2) *Vide Robinson v. Hardcastle*, ante, 23. & 344. and 2 T. R. 241.

For observations on the principal case, &c. see also *Bristow v. Warde*, 2 Ves. jun. 336. 348. 364. *Crompton v. Barrow*, 4 Ves. 684, 685. *Brudenell v. Elwes*, 7 Ves. 382. 388. 390, &c. See also 1 Ball & Beattie, 94. and the several references.

(3) Held afterwards, on the Master's report, to be a specific bequest, passing all which had been purchased with those bills. *Vide post.* 3 vol. 160.

(4) Lord *Loughborough* C. held, on one of the bills of review, that even under this decree, the husband was only chargeable with any part of the principal of his wife's separate property, and by no means in respect of rents and profits received during the coverture. His Lordship, however, added an express direction to that effect. See 2 Ves. jun. 698. 715. 716.

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money were invested, should be taken out of the personal estate, in lieu of such trust money, and applied in manner therein-after mentioned; he gave and devised to the surviving trustee in the marriage-settlement, the sum of 10,000*l.* part of the said sum of 20,861*l.* 14*s.* 9*d.* (subject to an annuity to his wife) in trust to lay out in real estate, to be conveyed in trust for his daughter Mary during her life, for her sole, separate, and peculiar use, remainder to the trustees to support contingent remainders, remainder to all and every the child and children of his daughter Mary, as tenants in common, with remainders over; and, as to the residue of the said sum of 20,861*l.* 14*s.* 9*d.* he directed that his daughter Ann should be entitled to the same, for her separate use; and he further gave to his [*] daughter Ann the further sum of 30,000*l.* and he gave also to Ann, all his manors, &c. freehold and copyhold, for life, remainder to trustees, to preserve contingent remainders, with remainders in strict settlement, with remainders to the first and other sons of Mary, and an ultimate remainder to — Smales in fee. — In 1771, Mary, the wife of Pinckney Wilkinson died, and in July 1771, Ann, the daughter, married Thomas Pitt, Esq. now Lord Camelford, and Pinckney Wilkinson gave her a portion of 40,000*l.* 3 per cent. Bank consol. annuities.

Soon after the marriage, Pinckney Wilkinson made a codicil to his will, dated 1st August 1771, reciting the will, the marriage of Ann, and the portion; and thereby revoked the legacy of 40,000*l.* given in his said will, to his said daughter Ann.

After the execution of the will and codicil, Pinckney Wilkinson purchased other lands, and 25th December 1781, made another codicil, by which he devised them to the same uses to which he had already devised the Polestead Hall estate; and further reciting that his daughters had been admitted to copyhold lands, and were entitled to such lands which had been their mother's, he directed that they, and all other persons, claiming by, through, or under them, should do every necessary act for settling the same, in like manner as he had by his will disposed of the Polestead Hall estate; and revoked all benefit given by his will to such persons as should refuse or neglect to do such acts, within six months after his decease; and gave not only all such benefit, but whatever such person or persons might become entitled to as his heir at law, or otherwise under him, to the same uses (as far as the law would permit) to which he had given his manors of Polestead Hall, &c. And whereas he was entitled to certain described stocks, and about 7000*l.* in navy bills, he gave the same to his executors, in trust, to accumulate for the children of his daughter Ann Pitt, in such shares as the said Thomas Pitt and Ann Pitt should appoint. And gave his personal estate, given to Ann Pitt for life, to the said Thomas Pitt, if he should survive his wife Ann, until he should marry again; but, upon his decease, or marriage, the remainder to take place as in his will.

Pinckney Wilkinson died 4th March 1784, seised and possessed of large, real, and personal property, and, in particular, of 18,000*l.* navy bills, without revoking his will or codicil.

[*54]

[*] It further appeared by the bill, that there had been some treaty between Pinckney Wilkinson and Mary his wife (5), for the purchase of her real estates, which, upon her marriage, were settled to her sole and separate use; and two receipts were proved in the cause, one for 262*l.* 10*s.* as the purchase-money for a little farm at Snettisham, Norfolk, whereof she promised to make him the proper conveyance on demand; the other for 930*l.* in part of 3106*l.* which he had agreed to pay for all her estates in any of the Burnhams, or elsewhere in Norfolk, which she promised to convey to him on demand. (5)

(5) Vide note (1) *antea*, p. 51.

Several points arose in the cause; the first raised by the bill was, whether the purchase of the lands in *Norfolk* by *Pinckney Wilkinson* was bound by the marriage-settlement. And, as to this point, the defendants, the *Smiths*, contended, that the purchase was made with trust-money advanced to *Pinckney Wilkinson* by the trustees for that purpose; and therefore was bound by the uses declared in the marriage-settlement. But to this argument it was answered, on the part of the plaintiffs, that no time being fixed by the articles, within which the purchase was to be made, *Pinckney Wilkinson* had his whole life to perform it; which he not having done, the personal estate must be liable to the payment of the 20,000*l*.

2. The next question was, whether the gift to *Mary Smith* for life, with remainder to her children, was a good execution of the power: and, upon this point, the cases of *Alexander v. Alexander*, 2 Vesey, 640. and *Mallison v. Andrews*, Ch. Hil. 1782, (cited *ante*, p. 26, n.) were cited, and said that a distinction had been made in *Cavendish v. Cavendish*, B. R. 11th February 1782, (also cited *ante*, p. 25, n.) between real and personal estate: but his Honor being clear upon this point, especially upon the cases of *Doe* on the demise of *Brownsmith v. Denny*, Hil. 29 Geo. 2. (cited 2 Wils. 337.) and *Adams v. Adams*, Cowp. 651. It was not further urged, but acknowledged that the excess was void.

3. The next question was, whether, if the appointment was bad, on account of the excess, the whole should be considered as unappointed. His Honor also stopped the argument (6) of this point, by asking, whether it should not go by *cy pres*, and cited the case of *Chapman v. Brown*, 3 Bur. 1626.

[*] 4. The 4th point was, whether the codicil revoking the 40,000*l*. legacy given by the will, whereas the will gave a legacy, properly so called, of 30,000*l*. only, the other 10,000*l*. being an appointment by virtue of the power, should revoke this latter 10,000*l*. also. This question was likewise but slightly agitated, it being conceded by the counsel for Lord and Lady *Camelford*, that the revocation extended to the 10,000*l*. and that *Pinckney Wilkinson* was become a purchaser of that moiety, by the fortune given to Lady *Camelford* on her marriage. (7)

5. The next point was, with respect to the navy bills. It appeared that, at the time of testator's death, he was possessed of 18,000*l*. navy bills; but, at the time of making the will, he was possessed of little more than 7000*l*. having that day disposed of about 2000*l*. the doubt was now what should pass. (8)

6. The last question was, whether the transaction between *Pinckney Wilkinson* and his wife amounted in equity to a purchase of her estate, and, if not, whether he should account for the rents and profits thereof; and whether the *Smiths* must not elect between the estate descended from the mother, and their claims under the will.

These points were argued by Mr. *Solicitor-General* (*Macdonald*) for the plaintiffs, Mr. *Scott* and Mr. *Hood* for Lord and Lady *Camelford*, Mr. *Ambler* for the infant defendant, Mr. *Price* and Mr. *Partridge* for the defendants *Smith* and his wife. The Reporter was absent when his Honor gave his opinion; but it was to the effect following:—his Honor declared the will of *Pinckney Wilkinson* and the second codicil thereto, to be well proved; and that no part of the trust-funds had been vested in

(6) Not so. It was argued on this point on behalf of Mrs. *Smith*, on the authority of *Humberston v. Humberston*, 1 P. W. 332.—From Lord *Redesdale's* notes. There is also a note to the same effect in the 3d edition.

(7) Lord *Redesdale's* notes refer, as to this, to a MSS. case of *Feast v. Feast*.

(8) When it afterwards came before the Court, on the Master's report, the Lord *Chancellor* held the bequest specific; and that several funds passed which had been purchased with the navy bills. *Vide* S. C. on this point, *post*. 3 vol. 160.

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the purchase of real estates ; that the whole of the trust-funds had been appointed, or satisfied by the will and codicils of the testator, and by the portion advanced on the marriage of Lady *Camelford*, and that the portion so advanced was to be considered as a satisfaction as well of her share of the 20,861*l.* 14*s.* 9*d.* as of the 30,000*l.* legacy bequeathed to her by the will. He also declared the appointment in favour of the defendant *Mary Smith* invalid, and that the whole of this share appointed to her for her separate use, is, in order to effectuate the testator's general intention, to [*] be considered to vest an estate-tail in the lands directed to be purchased with that share, in her, *Mary Smith*, with a remainder in fee to the defendant Lady *Camelford*. And his Honor further declared, that the real and personal estate of *Mary Wilkinson*, settled by the deed of the 13th *December* 1735, is to go according to such of the trusts as are capable of taking effect, subject to the election to be made after the accounts directed shall have been taken, and gave general directions for an account thereof, and of what navy bills, exchequer annuities, long annuities, and annuities of the year 1777, the testator was entitled to at the day of the date of this second codicil, and at the time of his death, and whether the same were sold or paid off, and how the money has been applied, to make a separate report as to that enquiry ; and also whether the testator possessed himself of any part of the real or personal estates of *Mary Wilkinson*, and declared, that whatsoever he should so have received is to be considered as a debt due from him (9), to be answered out of his personal estate ; and that the share of the sum of 20,861*l.* 14*s.* 9*d.* appointed in behalf of *Mary Smith*, should be laid out in land, and be settled to the use of two trustees in trust for her, and the heirs of her body ; she to have the rents, &c. to her separate use, and, in default of issue, to Lady *Camelford*, her heirs and assigns for ever, and reserved all further directions. (10)

(9) Lord *Loughborough* C. held this only referable to any *principal sums*, and by no means to any rents and profits received during the coverture : his Lordship, however, added a declaration to that effect. See 2 *Ves. jun.* 715, 716. *et antea*, p. 51. note (4).

(10) The Editor finds the above statement of the decree correspond exactly with *Reg. Lib.*

[S. C. 2 Dick.
796. *Quod vide.*]

Master of the
Rolls for Lord
Chancellor.

Money to be laid out in land ; an infant cannot [dispose of it by will as money (1) : but it will on the infant's death descend to his heir ; who may take it either way.]

CARR against ELLISON. [9th and 16th *May.*]

(*Reg. Lib.* 1785. A. fol. 390.)

BY a private act of parliament, money, which had been received as the price of lands, sold for the purpose of easy division, was ordered to be laid out in the purchase of lands, under the direction of this court, to be procured by petition to the Lord Chancellor. Under the uses declared by the act, a female infant had such an interest, that she might have elected to take it as money, absolutely ; but, while it continued land, it was subject to a remainder over. By her will, she disposed of it both ways, as money and land ; the will was duly attested to pass real estate. The question was, whether the money could pass by this will, or must be considered as land ; and therefore not to pass by the will of an infant.

[The plaintiff claimed it as heir at law, *ex parte maternd.*]

(1) And the Court, where it ever interferes, guards against every thing which may tend to change the nature of the property ; as between the representatives of infants, lunatics, &c. See *per Lord Eldon* C. in *Ware v. Polhill*, 11 *Ves.* 278, and the next note.

Master

[*] *Master of the Rolls*. — Money to be laid out in land must descend as land, from generation to generation, *Bowes v. The Earl of Shrewsbury*, 5 Brown's Parliament Cases, 269. The infant was seized of this, as of a real estate. During her infancy, she could not vary the nature of the estate. In the case of *Cave v. Cave*, a purchase was made, with personal estate, but subject to be considered as the personal estate of the child during infancy. (2) The court is, in this case, bound, by the act of parliament, to lay the money out in land, even though the person beneficially entitled might convert it again immediately. A petition must be presented to the Lord Chancellor, agreeable to the terms of the act of parliament. (3)

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ELLISON.
[*57]

(2) Lord Eldon C. says, in *Ware v. Polhill*, 11 Ves. 278. "I have uniformly made it a rule, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age at which he will have a disposable power, the representative shall not be prejudiced in any degree by the act done by the Court in contemplation of the infant's benefit in all the circumstances surprise or accident can throw round it. It is said this is the effect of the Court's declaration. That is not correct; for the declaration is made, because that is the law applicable to the case of the infant; and it is, of course, to reform the order. It does not create the right, but is a declaration of a pre-existing right so to have the property secured."

(3) The plaintiff accordingly presented his petition, which came on for hearing with the cause; whereupon and "on debate, &c." the Court declared that the plaintiff as the heir *ex parte materni* of the infant E. S. deceased, was entitled under the act of parliament to the sum in question: and he electing to take it instead of having it laid out in land, the funds were ordered to be transferred to him. R. L.

The Earl of TANKERVILLE against FAWCET. [May 9.]

(Reg. Lib. 1785. A. fol. 356.)

[Vide S. C.
1 Cox, 237.]

*Master of the
Rolls for Lord
Chancellor.*

FAWCET, having contracted the debt in question, which was by simple contract, and did not affect his real estate, devised his real estate to *Colville*, who, afterwards, charged this debt upon the estate, so devised to him. *Colville* by his will gave a leasehold estate to his wife, to whom he also gave his personal estate. This bill was filed, praying that the personal estate of *Colville* might exonerate the real, of this debt.

Personal estate
not to exonerate
the real, of
a debt not contracted
by the
party. (1)

Mr. Scott, for the executrix. — The rule is well understood, where the debt is not the debt of the person whose personal estate is called upon, the personal estate shall not be applied, in payment of it, but the land must go *cum onere*; but this was not the debt of *Colville*. — *Evelyn v. Evelyn*, 2 Wms. 591. If the money had been advanced to *Colville* himself, the personal estate would have been liable; but it consisted of an original debt of *Fawcet's*, and a large arrear of interest upon that debt.

Mr. Mitford, [on the same side.] — In *Lewis v. Nangle* (2), 2d November 1782, it was a mortgage of the wife's estate for her debts while sole, and for a further sum borrowed. It was decided, that the estate alone was liable, and the husband only bound to keep down the interest.

[*] *Master of the Rolls*. — The general personal estate shall be ap-

[*58]

(1) *Vide S. P. Lawson v. Hudson*, and *D. Ancaster v. Mayer*, *antea*, 1 vol. 58. 454. with the Editor's notes. Another point also seems to have been argued in the principal case. *Vide* 1 Cox. 239. See also in the judgment, *postea*, with regard to the specific bequest.

(2) *Ambler*, 180. and in Mr. Cox's note to *Evelyn v. Evelyn*, 2 P. W. 664. and 1 Cox. Ch. C. 240.

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Earl
TANKERVILLE
against
FAWCET.

plied in favour of the heir, be he *hæres natus* or *hæres factus*; but not so as to defeat a specific devise of the personal estate. If this be a specific devise, there is no doubt it is free from the debt. If it were given, in these terms, to a person who was not the general representative, it would be a specific devise; does it make it otherwise, that, in this case, the wife is general representative? I am strongly inclined (3) to think that it is a specific devise. (3)

Where an estate descends, or comes to one, subject to a mortgage, although the mortgage be afterwards assigned, and the party to whom it descended, enter into a covenant to pay the money borrowed; yet that shall not bind his personal estate. Here it was a very honourable transaction, on the part of *Colville*, as to the creditor. The general reasoning on the subject is all in *Evelyn v. Evelyn*. The specific devise is not liable to the debt. Bill dismissed.

(3) The report in 1 Cox, 239. states his Honor to have been "clearly" of opinion that it was a specific devise. Lord Eldon C. says, in *Milnes v. Slater*, 8 Ves. 305. "Every devise of real estate, whether in general terms or not, is in its nature specific." The leasehold there was classed with the real estates.

[Vide S. C.
1 Cox, 241. and
8 Vesey, 492.
498, 499.]

Master of the
Rolls for Lord
Chancellor.

[C. by his will
devised all his
freehold and
copyhold estates
to his two

daughters *A.* and *M.*, and all other daughters that he might thereafter have, as tenants in common in fee. He had afterwards another daughter *L.* He then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter *L.* The attorney took the minutes of this second will in writing; but before it was prepared, the testator died. These minutes were proved in the Spiritual Court as a testamentary paper. (2)

Held, 1st. This paper being proved in the Spiritual Court is sufficient to pass the copyhold estate. (3)
2d. But is so totally void as to the freehold, that it will not put *L.* to her election (4), and she therefore will take her share of the freeholds under the first will, as well as the 15,000*l.* under the second.

3d. The testator gave the 15,000*l.* to his daughter *L.*, to be paid to her at 21, or marriage, without interest for the same in the meantime; but if she died before 21, or marriage, then the 15,000*l.* was not to be raised, but was to sink into the residue of his personal estate. And he directed that out of the interest of the 15,000*l.* certain sums of money should be applied for the maintenance of *L.* The interest of this legacy, beyond the maintenance, is vested in *L.* and must be appropriated (5) to accumulate for her benefit.]

CAREY against ASKEW.

(1.)

IN this case there were two wills, one duly executed to pass lands; the latter was a paper of instructions for a new will, which the testator did

(1) The Editor could not find any entry in Reg. Lib.; which would have been a matter of regret from the defective report of the case, if the deficiencies were not supplied by the contemporary notes of Mr. Cox, Sir Samuel Romilly, Lord Redesdale, and Lord Eldon C. 1 Cox, 241. and 8 Ves. 492, 496, 497, *et ut supra*. The Editor particularly desires to refer the Profession to them; and especially to the point of election, which Mr. Brown has wholly omitted. The additions, &c. in the text above between brackets are from Lord Redesdale's notes.

(2) See Dyer, 72. a. In which, before the stat. of frauds, a will drawn from notes taken down in writing by counsel from the testator's mouth, was held sufficient to pass lands. From Lord Redesdale's notes.

(3) Lord Redesdale's notes state *Tuffnell v. Page*, which is reported Barn. Ch. 9. and 2 Atk. 37. to have been cited in the opening for the defendants; establishing the point as clear law; and the report of the principal case by Mr. Cox mentions that the M. R. would not put the counsel to argue it. Upon *Tuffnell v. Page*, see per Lord Hardwicke C. in *Attorney General v. Andrews*, 1 Ves. 225. And in *Tuffnell v. Page*, (as in 2 Atk. 38.) the Lord Chancellor referred to *Attorney General v. Barnes*, 2 Vern. 508. as having settled the doctrine. See also Hargr. Co. Litt. 111. b.

(4) The Editor wishing to render this edition as complete as lies within his limited powers, thinks the Profession may be gratified by having the circumstances of the case,

Election.

did not live to execute [or even see]: this latter had been proved as a will [in the Ecclesiastical Court; and administration granted accordingly upon suit.]

In the [unexecuted instrument] the testator had given the plaintiff 15,000*l.* to be paid at twenty-one, or marriage, with interest in the mean time; but, if she died before, to sink. This raised a question, whether the legacy should be appropriated, and whether interest should be paid, or no interest be raised, till the legacy was payable.

[There was a distinct provision out of the interest, for maintenance.]

The other question was, whether copyholds, surrendered to the use of the will, would pass by the will not duly attested to pass lands, [which was not even seen by the testator, being only the fair copy of a draft prepared by his attorney, and altered by the attorney in pursuance of the testator's directions (6); but after the testator had left him.]

[*] Upon the opening, his Honor alluded to *Tuffnell v. Page* (7), in the note on 2 Wms. 261.

Mr. *Mansfield* and Mr. *Madocks* (for the plaintiff.) — In order to pass the copyhold, it must be a writing signed by the testator. This is expressly required by the statute of frauds. This writing is not a regular writing (8); it is only an instruction upon which to form a regular writing (8): but it is insisted, that, for this purpose, whatever the eccle-

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CAREW
against
ASKEW.

[*59]

as to the point of election, stated here in one connected view, from the notes of Sir *Samuel Romilly*, and of Lord *Eldon C.*, as in *Sheddon v. Goodrich*, 8 Ves. 429, 496, 497: "In *Carew v. Askew*, which is not reported upon this point, the father of the plaintiff "seized of copyhold and freehold estates, the latter surrendered to the use of his will, by "his will dated in November 1773, charging his real and personal estate with his debts "and legacies, devised all his freehold and copyhold estates to his wife for life, and after "her death to his two daughters, and any he might have by his wife, equally share and "share alike. He had two daughters, defendant's, and afterwards another, the plaintiff, "by a second marriage. He afterwards made instructions for a will; but died before "execution, charging his debts and legacies, and giving to his daughter by his second "wife 15,000*l.* with a direction for maintenance. He then gave all his freehold and "copyhold estates, and the residue of his personal estate, to his two daughters by his "first wife. Probate of the instrument was granted as to the personal estate. It was "contended by the plaintiff, that the copyhold estate did not pass by an unexecuted will. "Another question was as to election by the plaintiff. Lord *Kenyon* said it was not a "case of election. In that case, Lord *Redesdale* cited *Stapleton v. Lord Colville* to the "same effect." From Sir *Samuel Romilly's* note.

The Master of the Rolls (Sir *L. Kenyon*) also said, that as his powers of discrimination were far inferior to those of Lord *Hardwicke*, he could not find himself warranted in agreeing altogether with *Boughton v. Boughton*, 2 Ves. 12.—From the Editor's MS. note of the statement of Sir *Samuel Romilly* on the above occasion.

Lord *Eldon C.* says, "I have looked at my own note of *Carew v. Askew*; and Mr. "Romilly's account of it is very correct. Mr. *Mansfield* argued in support of the distinction between *Boughton v. Boughton*, and *Hearle v. Greenbank*. I argued it on the "other side; and mentioned most of the topics, that have been argued on that side in "this case. Lord *Kenyon* said, the distinction was settled, and was not to be unsettled; "that if a pecuniary legacy was bequeathed by an unattested will, under an express condition to give up a real estate by that unattested will attempted to be disposed of, such "condition being expressed in the body of the will, it was a case of election; as he "could not take the legacy without complying with the express condition. But "Lord *Kenyon* also took it to be settled as Lord *Hardwicke* has adjudged, that if "there was nothing in the will but a mere devise of real estate, the will was not capable "of being read as to that part; and unless according to an express condition the legacy "was given so, that the testator said expressly, the legatee should not take, unless that "condition was complied with, it was not a case of election. The reason of that distinction, if it was *RES INTEGRA*, is questionable. After the doctrine has been so long "settled, (though with Lord *Kenyon* I think the distinction such as the mind cannot well "fasten upon,) it is better the law should be certain, than that every Judge should speculate upon improvements in it."

(5) *Vide* S. P. *Green v. Pigot*, ante, 1 vol. 103. and the notes.

(6) See note (2) in the preceding page.

(7) See note (3) in the preceding page.

(8) Lord *Redesdale's* notes state this "not" to be "the fact."

siastical

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siastical court calls a will shall be sufficient. *If that be so, a nuncupative or parole will would do.* (9) A surrender has no operation without a declaration of uses, which is here wanting, *Wagstaff v. Wagstaff*, 2 Wms. 258.

Then, as to the question, when plaintiff is entitled to the 15,000*l.* She is entitled immediately. The money must be immediately appropriated, and the interest must accumulate for her benefit.

Mr. Attorney General and Mr. Scott argued — that the copyholds passed, and the legacies did not vest.

Master of the Rolls. — The first point is as to the legacy of 15,000*l.* If there were no direction as to interest, the law is, that, where a parent gives a legacy to a child unprovided for, the child shall have interest from the day of the parent's death; but here the interest must pass by the very words of the will. I think the money must be immediately raised, although the child may not live to attain the age, or day of marriage, *Green v. Pigot*, (*ante*, vol. 1. 103.)

2. Respecting the copyholds, I hardly expected to hear it so seriously argued. It has been held, that a will, received by the ecclesiastical court, will govern the surrender of a copyhold. It would be removing landmarks to entertain a doubt upon the subject. I am clear, therefore, that the will passed the copyhold.

(9) See note (2) page 57.

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[8. C. more correctly 1 Cox, 245.]

*Master of the
Rolls for Lord
Chancellor.*

Conversion.—

Exoneration.—

Estate devised

to be sold for

payment of

debts [and lega-

cies, in the first

place; the resi-

due of the pro-

ceeds he gave

in moieties, and

directed that in

certain contin-

gencies one of such

moieties should

sink into and be

deemed part of his

personal estate.

Under this direction,

held, the testator's

interest was manifest

to exonerate the

personal estate. (1)]

[*] WEBB against JONES. [May 16.]

(Reg. Lib. 1785. B. fol. 361.)

THE testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and other debts (1), *the residue to be added to his personal estate.*

The only question was, whether under this devise, the real estate should exonerate the personal estate.

Mr. Richards contended these words were not sufficient. That in order to be so, there must be a destination as to the estate to be sold for the mere purpose of the payment of debts. Here was only a direction *in transitu*, and the words do not necessarily imply that the personality was to be exonerated. The trustees are not under this devise bound to

Under this direction, held, the testator's interest was manifest to exonerate the personal estate. (1)]

(1) See Mr. Cox's report of this case, in the first vol. of his Reports, 245. It appears from Reg. Lib. and from thence, that "as to the residue of the purchase-money to arise from such sale, he gave the same" in moieties; one of which was for his daughter Mary, her executors, administrators, and assigns: the other was on certain contingencies for the children of his daughter Ann. And in case they all should die under 24, he directed that such moiety should sink into, and be deemed as part of the residue of his personal estate, and be paid and applied as his personal estate was thereafter given and disposed of; and he directed that the rents till such sale should be applied to the use of his daughter Ann, her executors, administrators, and assigns. Reg. Lib. This last clause is not in Mr. Cox's report, but in connection with the gift of the other moiety to Mary, "her executors," &c. it seems by no means immaterial to shew the intention as to a total conversion of the real estate into personality.

Upon the cases of exoneration, &c. see *Samwell v. Wake*, and *D. of Ancaster v. Mayer*, *antea*, 1 vol. 144. & 454, &c. with the Editor's notes and references: and see particularly *Stephenson v. Heathcote*, 1 Eden's Ca. Ld. North, 38, &c. *Boote v. Blundell*, 1 Meriv. 193, &c. 236, 237. *Gittins v. Steele*, 1 Swanston, 24, &c.

sell

sell the estate immediately, yet the debts must be immediately paid: that must be out of the personal estate. The residue being devised, may be taken as a specific legacy, and yet may be liable to debts. *French v. Chichester*, 2 Vern. 568. Express words are necessary to exempt the personal estate, 3 Wms. 325. *Samwell v. Wake*, ante, vol. 1. 144. *Duke of Ancaster v. Mayer*, *Ibid.* 454.

Master of the Rolls.—I have no doubt about this case. The general rules are very clear that the personal estate is the fund first liable, and that the testator cannot exonerate it without substituting another fund. But there is no magic in words; no peculiar form of expression is necessary in order to exonerate the personal estate. If the intention of the testator be evident to exonerate the personalty, it must be exonerated.

Here, the intention is beyond all doubt, (I lay no great stress, but I must lay some upon the words,) “when sold, the money to be applied to the payment of mortgages, and all other debts.” If one was to ask the testator what he meant, he would say, to pay *all* the debts. This is a stronger case than that of *Mayer* and the Duke of *Ancaster*. The testator has directed the residue to be *added* to the personal estate (2); but, according to the construction contended for, that would be gone. I must declare, that the money arising from the sale is to be applied in payment of debts, in exoneration of the personal estate.

(2) “Now this is incompatible with the idea that the personal estate should be applied in the first instance.” *Vide* 1 Cox, 246.

1786.

Witness
against
Jones.

[*] *GEAST against BARKER.*

(1)

THE bill was filed for a discovery of the quantity of coal and coke, sold from a mine, let by plaintiff to the defendant. The bill stated the reservation to be one shilling for every stack of coal sold, one shilling for every such quantity of coke as should sell for as much money as a stack of coal should sell for, and one shilling for so much coal (of an inferior species) as should sell for the same sum as a stack of coal should sell for. The bill further prayed an issue, to try what quantity a stack should contain, suggesting that a stack (by the custom of the country) should not be more than seventy-two cubic feet. The defendant, by his answer, insisted, a stack ought to contain eighty-six cubic feet.

The question was, whether the bill should be dismissed in the first instance, or retained for a year, with leave to try an issue.

Mr. Price and Mr. Scott (for the defendant),—pressed that the bill should be dismissed, the remedy being solely at law. That, had the bill been demurred to, the demurrer must have been allowed; for that at law they would have only to ascertain the size of the stack, and to apply

Bill for rent of a mine retained for a year to suffer plaintiff to try an issue as to the quantity of coal which by the custom of the country constituted a stack, the reservation being 1s. per stack (2)

(1) No entry in Reg. Lib. on this occasion; but the bill was afterwards dismissed. Reg. Lib. 1787. A. fol. 352. b.

(2) Sir W. Grant M. R., in *Harwood v. Oglander*, 6 Ves. 225. referring to this case, says, “It is not a necessary consequence that the Court will not ultimately determine against the plaintiff in equity, because the bill has been retained; and if I am not mistaken, Lord Kenyon dismissed that bill.” It appears from Reg. Lib. that it was dismissed, upon the plaintiff’s own motion, and consent of the defendant, on the 15th April, 1788. (Reg. Lib. 1787. A. fol. 352. b.)

the

[*61]

[S. C. not S. P.
ante, page 1.]

Master of the
Rolls for Lord
Chancellor.

1786.

GEAST
against
BARKER.

the discovery of the quantity sold, which they had obtained from the answer. It was to be presumed the answer contained this discovery; if it did not, the plaintiff might have excepted to it on that account.

Mr. Attorney General and Mr. Lloyd contended. — The bill ought to be retained: that they could not prove the quantity sold, a great deal of it not having been stacked; so that the proportion could not be ascertained.

The Master of the Rolls said. — If it was now necessary either to decree an account, or to dismiss the bill, he would do the latter, as he was clear the remedy was at law: but as there was a middle way, which would have no evil consequence, but deferring the defendant's receiving the costs for a year, and, as some difficulties might arise at law, he would retain the bill for a year, in order that the plaintiff might try the issue at law. (2)

(2) See note (2) in the preceding page.

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Master of the
Rolls for Lord
Chancellor.

[*] BROWNELL against BROWNELL.

(Reg. Lib. 1785. A. fol. 632. b.)

An account
settled ten years
before bill filed,
although con-
taining gross
errors, shall not
be opened; but
the plaintiff at
liberty to sur-
charge and
falsify.

THIS was a bill to open an account settled ten years before the bill filed.

It was a devise by a father to his two sons, the younger of whom, the plaintiff, was a minor, and the elder, the defendant, adult, of four sloops in the Custom-house service. The share of the infant son was to be laid out for his benefit, until he should attain the age of twenty-three years, then to be paid him for his own use; and if he should die before that age, the whole was to go to the defendant. The defendant took possession of the property, and, upon the 22d October 1772, he met the plaintiff, and told him he had stated the account; and there was a balance due of thirty-nine pounds, which he paid to him: and the plaintiff, from confidence in his brother, accepted. Afterwards he found a pocket-book of his father's, in which the value of the ships, and the price at which they were let to government, were stated, and occasioned him to make further enquiry: in consequence of which, he found several gross false charges with respect to the price at which the ships sold, and the wages from government. The defendant had given credit for less than half he had received; he had charged, for repairs of one ship, double the sum for which he sold the ship in the course of the year, and other very gross errors; on which the plaintiff filed this bill.

Mr. Scott (for the plaintiff), — stated this case, and contended it would not be enough to surcharge and falsify, but that the whole account must be opened. Here the elder brother was a trustee for the defendant; all the articles were grossly fallacious; the accounts were different in the different answers. No vouchers had been given up, and the account was settled in confidence. And although, where a fair and just account is settled with an infant, it shall not be opened; yet, where it is unfair, it shall be opened, 2 Atkyns, 119, even notwithstanding death has intervened.

Mr. Price and Mr. Mansfield (for the defendant), — insisted the elder brother was not in this case a trustee for the younger; the settlement was at the end of two years after he became entitled [*] to the moiety. Only four articles in the account are attacked, and the plaintiff wants to have the whole unravelled. The plaintiff had the account sent

[*63]

sent to him before the payment of the balance; and there is no proof in the cause of the surprize charged in settling of it.

Master of the Rolls. — This case has not been over-rated, in saying the brother was a trustee for the plaintiff. It is to be wished, in settling such an account, that the vouchers should be forced upon a young man. If the application had been recent, I should think this a case for opening the account: but where there has been an acquiescence for eleven years the labouring oar is upon the party calling for the account. There are several items in this account objected to with great force. The 52*l.* 10*s.* for sundries. As to this, if I were to let in the objection, I should throw innumerable difficulties in the defendant's way, as the charge consists of many articles. The 50*l.* received at the Custom-house: upon this alone I should not send it to the Master. But there are other items of a different nature; 47*l.* is charged as paid to the auctioneer, who swears to have received only 12*l.* 6*s.* If this can be explained, it will be right to put it in the way of being so. So, of the sale of the ship *Hollis*, it is fit that should be enquired into. The matter is not sufficient to open the whole account, but it is sufficient to answer the calls of justice to let the plaintiff falsify the price of the *Hollis*, the sum paid to the auctioneer, and the Custom-house account. (1)

1786.

BROWNELL
against
BROWNELL.

(1) [“ The plaintiff having falsified the account before the Master, to the amount of “ 200*l.* and upwards (the whole being about 2000*l.*), the cause came on for further directions on the 24th of May, 1787; when his Honor decreed the defendant to pay the “ balance, with 4 per cent. interest and costs. — From Mr. Cox's MS. note. The Editor finds it agree accordingly with Reg. Lib. 1786. A. fol. 432. b.]

COOPER against FORBES.

(No entry.)

Rolls, 17 May.

HIS Honor determined that a child, *in ventre sa mere*, shall not take under a bequest to the children of *A.* living at the death of the testator. He relied upon the cases of *Ellison v. Airey*, 1 Vesey, 111. and *Pierson v. Garnet*; *ante*, p. 38.

Infant *in ventre sa mere*.

[*] MILBOURN against MILBOURN.

(Reg. Lib. 1785. B. fol. 296.)

[*64.]

[*Vide* S.C.
1 Cox, 247.
and 15 Ves.
400. 403.]

Rolls same day.

CLAYTON MILBOURN being seised of real estates, and possessed of leaseholds in Kent, Huntingdonshire and Cambridgeshire, and particularly of two copyholds in Huntingdonshire and Cambridgeshire, by

Copyhold will not pass by a will without surrender; nor will a surrender description. (1)

be supplied for a wife by general words, where there are other estates to answer the

(1) *Vide* S. P. *Byas v. Byas*, 2 Ves. 164. and Supplement to Vesey, sen. 315, 316.

It is to be observed that a considerable alteration has been lately made in the law relative to copyholds by the stat. 55 Geo. 3. chap. 192., which dispenses with the necessity of a surrender in respect of all testators dying after the passing of that act, upon payment by the persons entitled or claiming, of all duties, fees, &c. that would have been due and payable in case a surrender had been made. It is also to be noticed, that it seems most *advantageous* to surrender to the use of the will in every case where it can be done, notwithstanding the benefit of the act. See Scriven on Copyholds, 129. The act in question is inserted, *ibid.* p. 610.

Necessity of surrenders now dispensed with by stat. 55 G. 3. c. 192.

will

1786.

MILBOURN
against
MILBOURN.

will dated 11th May 1723, [after declaring he meant to dispose of all his estates, &c.] devised all his messuages, farms, lands, tenements, and hereditaments, with the appurtenances, in the counties of *Huntingdonshire* and *Cambridgeshire*, to his wife for life, and, after her decease, to his eldest son, *Clayton Milbourn*, in tail, remainder to his second son in tail, remainder to his wife in fee. The eldest son, who lived many years, never made any claim of the copyholds, which were not surrendered to the uses of the will.

[The question was, whether, as the testator had not surrendered his copyhold estates, they would pass under the general devise; and whether the court would supply the want of a surrender in favour of the wife. (2)]

The *Master of the Rolls* (3) held, that the copyholds, not being surrendered, did not pass. [Bill dismissed with costs, R. L.]

(2) See 1 Cox, 247. and 15 Ves. 400. 403.

(3) Mr. Cox states the judgment as follows: — “ *M. R.* The general rule is, that “wherever it is apparent that the party means to include copyhold premises in a devise in favour of creditors, or wife or children, the Court will supply a want of a surrender to the use of the will. The only question therefore is, whether the party here meant to comprehend the copyhold premises, under the general terms he has made use of. In all cases (especially relating to real property), it is very fit to abide by the rules already laid down, which are properly called the land-marks of property, although I must admit. I think some of the cases have been carried too far. As to *Drake v. Robinson*, 1 Wms. 444. I cannot understand Lord *Macclesfield*’s distinction between the sons and the creditors. [A] However, I am glad to find other cases which will guide me in this. In *Ross v. Ross*, 1 Eq. Ca. Ab. 124. it is settled, that where there are freehold lands to satisfy the words of the will, the copyhold will not pass. To the same effect is *Haslewood v. Pope*, 3 Wms. 322. Copyholds, not being in their nature objects of testamentary disposition, shall not be supposed within the intention of the testator, unless he has shewn such intention by surrendering them to the use of his will; or in case the words of the will cannot be satisfied otherwise; and then, in favour of creditors, wife, or children, the Court will become auxiliary to the imperfect disposition. I do not rest much on the particular wording of the will, although it certainly appears to be drawn by a skilful person; and therefore the technical words made use of, which apply peculiarly to freehold lands, have some weight. However, I proceed principally on the authorities decided by Lord *Talbot* (*Harris v. Ingledew*, 3 Wms. 96. *Haslewood v. Pope*, 3 Wms. 322.) and Sir *Joseph Jekyll* (both men of consummate knowledge); and, as there are in this case freehold lands to answer the words of the devise, I think the defect of the surrender ought not to be supplied as to the copyhold.”

[A] “This is now fully explained,” per Lord *Eldon* C. in *Church v. Mundy*, 15 Ves. 400. and *Judd v. Pratt*, *ibid.* 390, &c.

Earl BATHURST against BURDEN.

(Reg. Lib. 1785. A. fol. 440. b.)

Master of the
Rolls for Lord
Chancellor.

Demurrer to
bill for an in-
junction to re-
strain injuring
fish-ponds over-
ruled. (1)

[The Court
also in this case

restrained a tenant from building, so as to interrupt his landlord’s prospect. *Sed quare?*]

BILL that the defendants, lessees of the plaintiff, may be decreed to keep the sills [of fish-ponds] in repair, and be restrained, by injunction from obstructing them; and from erecting any further buildings, they having begun such as would interrupt the prospect from the plaintiff’s house, and would be disagreeable objects. (2)

This

(1) Though an order was refused specifically to repair the banks of a canal, stopgates, &c. yet the Court framed an order so as to obtain the effect, by restraining the defendant, impeding the plaintiff, by continuing to keep the canals, banks, or weirs, out of repair, or diverting the water, &c. &c. &c. *Lane v. Newdigate*, 10 Ves. 192.

(2) Notwithstanding what is said in this case, as to restraining the erection of buildings

This was a general demurrer for want of equity.

Mr. Mansfield and Mr. Lloyd in support of the demurrer.

The lease amounts to a covenant to keep the sills, banks, &c. in repair. The bill goes on to state, that the defendants have erected more buildings than Lord Bathurst expected they would; and there is no covenant in the lease that they shall not do so. This is not a bill to stay waste, but only brought upon an apprehension [*] of being injured; where the party will not stay till he is so, and then apply to a jury. The second part of the prayer is, that they may be restrained from obstructing the sills, to prevent the overflowing of the water. This is not the subject of an injunction. If any thing was about to be done which would occasion irreparable, or perhaps great, mischief, that could not be remedied, the Court might interpose; but here there is no mischief; but that the stewponds may be overflowed, and the banks hurt. The next part is to prevent their building. This is a prayer to prevent their improving their estates: there is no covenant in the lease not to build. In cases where there are covenants to expend all the dung upon the estate, or to cultivate in a particular manner, on a breach, the Lord Chancellor has not thought it a case for application here, but that it only was in damages. (3)

Master of the Rolls. — This court will not interpose where the matter is merely in damages; but here a nobleman, having a scat, has granted privileges to the defendants, which they are using in such a way, as interferes with his pleasureable enjoyment of his property. (4) The Duke of Beaufort obtained an injunction against persons who were building near him, to prevent their building so high as to obstruct the light of his windows, in the house now Gloucester House. So, in Lord Kilmorey v. Thackeray, Lord Kilmorey had granted lands on the river Dee, with covenant to keep the banks in repair, the court of Exchequer were of opinion it was a proper subject for an injunction, as the verdict of a jury would be an imperfect remedy. So, in a case where a tenant was plowing up a bowling-green. In this case a damage is expected to be done to the fish-ponds, which in many cases are very valuable. I think I should not stop this cause in the first step; I should have been desirous; if compelled to it, to have made a precedent; but am glad to be able to find that of Lord Kilmorey v. Thackeray.

Demurrer over-ruled.

ings which interfere with a nobleman's, or any man's, "pleasurable enjoyment of his property," such a jurisdiction to restrain a person from building on ground which belongs to him, whether by lease or otherwise, can never be maintained upon the mere foundation of interrupting another's prospect. Lord Hardwicke repeatedly refused such attempts in the strongest language, and Lord Eldon C. has, as often, disclaimed such an interference.

See in *Morris v. Ld. Berkeley*, and *Attorney General v. Doughty*, 2 Ves. 453, 454. *Fishmonger's Company v. East India Company*, 1 Dick. 163. 165. and *Attorney General v. Nichol*, 16 Ves. 338. 341, 342.

It appears from these cases, that "whoever comes into equity on such a right must find it either on the defendants' building, so as to stop ancient lights, or else on some agreement, either proved or reasonably implied;" "that a diminution of the value of the premises is not a ground; and that the Court will not interpose on every degree of darkening ancient lights." — See per Lord Hardwicke and Lord Eldon C. *ubi supra*.

(3) It is now, however, usual to restrain tenants from removing hay, straw, dung, &c. or acting contrary to their express covenants. See *Kimpton v. Eve*, 2 Ves. & B. 349. *Sparrier v. Pearkes*, per Lord Eldon C. 25 Jan. 1811, &c. &c. See also *Pratt v. Brett*, 2 Madd. Rep. 63.

(4) But see note (2).

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against
BURDEN.

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{S. C. 2 Dick.
670.]*Master of the
Rolls for Lord
Chancellor.**Assignee of a
mortgage from
persons not
having notice
of mortgagor's
being only ten-
ant for life,
not bound to
discover whe-
ther he himself
had notice. (1)*[*] SWEET *against* SOUTHCOTE.

(No Entry on this occasion.)

THIS was a bill to discover whether the defendant, who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that the title-deed, by which this appeared, was in the defendant's hands.

The defendant pleaded that he was assignee of the mortgage for valuable consideration, and through many assignments, from persons who had no notice.

It was argued, that this plea was not good; for it should have stated whether the defendant, personally, had notice.

But his *Honor* allowed the plea, holding that the plaintiff could not call upon the defendant to shew whether he had or had not notice; for whether he had, or had not, was immaterial if those through whom he claimed had not; he having a right to avail himself of their being purchasers without notice. (1)

(1) See Mr. Beames' *Elem. of Pleas in Equity*, p. 243, and the authorities in the note.

S. C. 2 Dick.
672.]*Master of the
Rolls for Lord
Chancellor.**There shall not
be two demur-
rers to the same
bill, but if a de-
murrer to the
original bill be
over-ruled,
there may be a
demurrer to the
amended bill.*BANCROFT *against* WARDOUR.

(Reg. Lib. 1785. A. fol. 438.)

THIS was a demurrer to a bill for an injunction, and account of profits in selling drugs; the answer admitted *importing* only, not *selling*; but the principal objection to the demurrer was made by Mr. *Mansfield*, that there had been a former demurrer to this bill, which was over-ruled by Lord *Chancellor*; and there could not be two dilatories.

His *Honor* said, that he remembered a rule laid down somewhere, that, after a demurrer over-ruled, there could not be a second demurrer: but that it was an answer to that rule, in this case, that this was an amended bill.

The demurrer was over-ruled on another ground, that the plaintiff had stated a partnership, and prayed an account.

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*Master of the
Rolls for Lord
Chancellor.**John Richard-
son Currer,
having an estate
for life under*

the will of Sarah Currer, with remainder in tail to Henry Richardson; devised his own estate, together with the estate under the will to trustees to uses by which the tenant in tail would take only a life-estate, but provided that his own estates should not be conveyed until the tenant in tail should suffer a recovery, and bar the remainders in the former will. Henry Richardson did acts of ownership, and prepared for, but never suffered, the recovery, and died. — This is not a case of election, but a condition precedent which the tenant in tail not having performed, John Richardson Currer's own estate never vested, and the estate of Sarah Currer is not affected by it. (1)

[*] ROUNDEL *against* CURRER. [24. 26, & 27 May.]

(Reg. Lib. 1785. B. fol. 593 b.)

SARAH CURRER, by will, dated 5th August 1778, devised her real estates to *John Richardson* for life, without impeachment of

(1) S. P. D. of *Montague v. Ld. Beaulieu*, Dom. Proc. 3 Bro. P. C. 277. octavo edition, and 6 vol. 232. folio edition. S. C. Ambler, 533, 534. marginal note.

waste,

waste, provided he took the name of *Currer*; remainder to his first and other sons, in tail male; remainder to her cousin *Richard Richardson*, son of her cousin *Henry Richardson*, in tail male; remainder to (*Henry*) the second son of *Henry Richardson*, in tail male; remainder to the right heirs of *Dorothy Currer*: and gave the first and other takers, powers of jointuring, and to provide portions for younger children.

After the death of the testatrix, *John Richardson* entered and took the name of *Currer*. The personal estate not being sufficient, and there being a charge, he sold a small part of the real estate for the payment of debts; and, in order to avoid the sale of more of the land, paid 5000*l.* of the debts with his own money, and took assignments of the debts.

Henry Richardson, and *Richard* his son, the devisee over in tail, both died in the life-time of *John Richardson Currer*, by which the remainder in tail vested in *Henry Richardson*, the second son.

John Richardson Currer purchased additional estates, and, being desirous that the two estates should go together, he made his will 10th October, 1763, reciting the will of *Sarah Currer*, and the other matters before stated: he devised, all his own lands (except one estate otherwise disposed of), and also the lands devised to him by *Sarah Currer*, to trustees, to be by them conveyed to other trustees, to the use of *Henry Richardson* for life; remainder to his first and other sons in tail-male; remainder to the plaintiff *Roundel*, and his heirs male, in tail-male; remainder to the daughter or daughters of *Henry Richardson*; remainder to his own right heirs. The devise is upon express condition, that *Henry Richardson* should, within six months, suffer a recovery, and bar the remainders in *Sarah Currer's* will, and convey all her estates to such persons, &c. as were declared by his will as to his own estates, and no conveyance of his estates to be made before *Henry Richardson* had suffered the recovery; and, in default [*] of his suffering such recovery, to convey his estates to other trustees, to the use of the plaintiff *Roundel* for life, with remainders over: and, in case *Henry Richardson* should comply with the terms of the will, then he was to have powers of jointuring and raising portions for daughters, if he should have no male-issue, provided there shall be contained in such conveyance a proviso to compel *Henry Richardson*, and the husbands of any women who should come into possession, to take the name and arms of *Currer*, and declaring this to be a condition precedent to the vesting of the estate.

By a codicil (not having disposed of his personal estate), he gave his personal estate to *Henry Richardson*, on condition of his performing the conditions in his will; and, if he should refuse so to do, then he gave it to trustees to lay out in lands, to the uses declared in his will as to his own estates.

After the death of *John Richardson Currer*, *Henry Richardson* proved the will, entered, and took the name of *Currer*, and did various acts, which, in case of a freehold estate, would amount to an election, and made preparations for suffering the recovery, but died before the recovery was completed, without issue-male; but left his wife *enseint* of a child, which proved a female.

Henry Richardson Currer was heir at law to *Sarah Currer*, *John Richardson Currer*, and *Dorothy Currer*, consequently his daughter was so. If *Henry Richardson* had performed the conditions of *John Richardson Currer's* will, the plaintiff *Roundel* was entitled for life to the possession of both his and *Sarah Currer's* estate; if not, upon his death, the estate-tail was spent, and the reversion to the right heir of *Dorothy Currer*, was fallen in and went to the infant daughter.

The bill was filed by *Roundel*, insisting that the acts done by *Henry Richardson Currer* were a sufficient election to take under the will of

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John Richardson Currer; and therefore praying a conveyance of both the estates under that will.

Mr. *Scott* for the plaintiff, stated the case at large, and was supported by Mr. *Graham* and Mr. *Lloyd* to the following effect:

[*] Two questions arise in the cause, 1. What was the intention of *John Richardson Currer*, with respect to the estate which came from *Sarah Currer*.

2. Whether the acts done by *Henry Richardson Currer* are sufficient to bind his daughter.

It may be first necessary to consider the interest of *Roundel* in the purchased estates of *John Richardson Currer*. He is entitled to take the possession of the purchased estates, and also of the personal estate of *John Richardson Currer* (at all events), to be laid out in land. If there was not such a right as to entitle us to the real estate, yet we should be entitled to the personal estate. It was not necessary *Henry Richardson Currer* should do the acts to entitle us to the personal estate.

At the time of making *John Richardson Currer's* will, he was tenant for life, and *Henry* was tenant in tail. The testator's wish was, that the estates should go together, and be united. For this purpose, he has required that a recovery should be suffered. It is mentioned as the means, but is only subservient to the principal intention, that the estates should be united. If therefore he complied as far as he could during his life, and did acts which would amount to an election in the case of an estate in fee, the reversion in fee would be bound, *Douglas*, 65. *Statham v. Bell*. Even take it strictly as a condition at law, if prevented by death, it will be held to be performed, *Touchstone*, 144. Much more in this case where it is only a conditional limitation, *Pulteney v. Lord Darlington*. The court will not call for a strict execution, if the condition is complied with as nearly as possible. In *Pulteney* and *Lord Darlington*, Lord Chief Justice *De Grey* cited the case of the Duke of *Somerset* and Lord *Grey*, that the party accepting should be held to have made his election. In the present case, *Henry Richardson Currer* had no interest in the estate, but under the will. His taking possession, and doing acts of ownership, was an election. He has proceeded as far as possible to complete the act: he has made a conveyance to a trustee to make a tenant to the præcipe, which, though it would not have bound his issue-male, they might have adopted it, and it was their interest so to do, and which, if he died [*] without issue-male, bound the estate. The testator could not mean unnecessary acts to be done; having done sufficient to make an election, the plaintiff is entitled to a life-estate in both.

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But if the acts are not sufficient to entitle as to *Sarah Currer's* estate, we are certainly entitled to that of *John Richardson Currer*. Considering the general intention of his will, there can be no doubt upon this point: it must be good as a conditional limitation, *Avelyn v. Ward*, 1 Vesey, 420. *Henry Currer* could not mean to refuse, merely that his heir at law should defeat the devise. By the same construction of the will, we are entitled to the personal estate.

Mr. *Solicitor-General*, Mr. *Mansfield*, and Mr. *Mitford*, for the defendant, the infant daughter of *Henry Richardson Currer*. — The testator requires a certain act to be done, within a certain time, and, if not done, he makes a particular disposition of the estate. It is not necessary to deny, that if the devisee has done acts equivalent with that required, that will be a compliance with the requisition of the will; but the question is, whether the act is equivalent. The testator pointed out a specific act; if the devisee had levied a fine, it might have been doubtful whether that was equivalent. The first question is, what was the intention of

John

John Currer; it was clearly, that the estates should go together: but the question would have gone further, whether the heir in tail had concurred, was he precluded by the election he had made, from making any further election? These cases, where the election is to be within a limited time, are to be considered differently from those where no time is given: where it is to be done within six months, you must find the act literally done; unless the acts amount to a virtual execution of those required, it is not sufficient. As to his taking the personal estate into his hands, he had a right so to do as executor, and so he had to receive the rents as heir at law, till the expiration of the six months; of course they were both equivocal acts.

Master of the Rolls.—May there not be a distinction, where the condition is to entitle the party to take, or where it is to defeat him?

[*] *Solicitor-General.*—The distinction has gone through all the cases; and, in all the old cases, if the act was not done particularly, the estate could not vest; but lately, it has been extended to acts equivalent, yet not to cases where the particular act is to be done in a limited time. The acts done here are equivocal acts. If the devisee's mind is not made up to accept the estate, the acts are not binding; he may elect otherwise within the time prescribed, the acts are all equivocal, and such as might be prudent either way; and the conveyance which he did execute was to such uses as he should declare, not to the uses of the will. If we are to enter into presumptive evidence of the state of his mind, it seems singular, if he meant to accept, that he did not do the very act required, by which he could have given his daughter 5000*l.* and could have made an addition to his wife's jointure. It is impossible he could mean to bind his daughter, and yet that he should not give her what he could. The cases cited, of the Duke of *Somerset* and others, are all cases where there was no time limited for the performance of the act; they are all general cases of election. In the case of *Call v. Shewel* in 1773, the question was, whether the party had neglected or refused; and it was held that the literal terms must be complied with, and the party must live to the time. Elections may, frequently, be more fully made, and not be sufficient. It appears from *Pusey and Desbouvrie*, 3 Wms. 315. that a declaration by parole, that he had elected, would not do. So, in *Boynton v. Boynton*, (ante, vol. i. 445.) an election by answer would not bind; so, *Bustard v. Kenyon*, Nov. 30. 1753.

Mr. Scott in reply.—The argument of the defendant is inconsistent; they have done nothing more than taken disputable cases as clear ones. They have rested upon there being a specified time to perform the acts. I contended, that *Henry Richardson Currer* had made an election to take the property of *John Richardson Currer*. Where there is no appointed time within which the election is to be, the party who claims, subject to the election, may file his bill, and compel an election; and here, within the six months, he might have been compelled, and could not afterwards have varied his election. If *Henry Richardson Currer* had come here for a conveyance, he must have offered to settle the estates according to the will; he must have pledged [*] himself to do all necessary acts for making that settlement. *Mr. Solicitor* says the cases of election do not apply, and that the acts are insufficient. If, in fact, the acts amount to an election, they will be sufficient to give this estate to the plaintiff *Roundel*; but the acts are such that they are a sufficient election, to amount to an acquisition to the family of *Henry Richardson Currer* of the estates of *John Richardson Currer*; and therefore the family of *Henry Richardson Currer* must pay the price for those estates. If *Henry Richardson Currer* has done what is equivalent to that required by *John Richardson Currer*, there, according to the true intent of *John Richardson Currer*, he has made an election. It is said,

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that if *Henry Richardson Currer* had left a son, he would not have been bound; he might, as tenant in tail, but not as heir at law. *Miss Currer* is mere heir, not tenant in tail. In *Starkey v. Starkey*, where the party had made an election, and then wished to resort to his estate-tail, the court made a recompence out of the personal estate. Here it is no answer for *Miss Currer* that the son would not be bound. Put the case, that *Henry Richardson Currer* had died at the end of a month, the terms in that case could not have been complied with, yet the estate would have been bound. Mr. *Solicitor* did not contend but that a fine would have been sufficient; then it is not necessary to do the specific act. If *Henry Richardson Currer* had suffered a recovery, that would have done: then, if the same effect is produced, as if he had suffered a recovery, it is immaterial by what means it is done. The only difference between this and the common cases is, that here is a limited time, in which the other party must come to compel the election. *Pulteney v. Lord Darlington* has nothing to do with this case; the court thought there that she had not done sufficient acts to bind herself. As to the Duke of *Montague* and Lord *Beaulieu*, 6 Bro. Parl. Cases, 232.) (2) an answer has been given to that case; that wherever it shall occur again in specie, it must prevail; but if there is a jota of difference, it shall not. No argument will arise from *Henry Richardson Currer* not exercising the powers; for he had the same under *Sarah Currer's* will, and did not execute them. Douglas, 65. is in form a condition precedent, but was held a conditional limitation.

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Master of the Rolls.— This is a case of some difficulty, and I might very well reserve the consideration of it: but I think I [*] shall serve the interests of the parties better, by giving an immediate opinion. It arises upon the will of *John Richardson Currer*, made with reference to that of *Sarah Currer* (both which his Honor stated). The bill is brought by *William Roundel*, praying that the will may be carried into execution, and that *Henry Richardson Currer* may be declared to have elected to take under the will. The important question is, whether the reversion in fee, descended, is liable to be conveyed to *William Roundel* under the will. Great stress has been laid on the point of election, whether the acts of *Henry* are sufficient to constitute an election, and whether the daughter is bound to convey: and, if I thought the question was to be decided by the point of election, I would send it to a jury; but I do not think it accurately stated when it is called a case of election. The material question is, whether *Henry Richardson Currer* has done all the acts he must do, in order to entitle himself to *John Richardson Currer's* estate. The plan was, that before he should have entitled himself to it, no conveyance should be made. The means by which it was to be effected, was, that he should suffer a recovery; and I will not say that any other conveyance would answer the intent. The testator has directed the means, and none so proper to perform the intent. In certain possible events, a fine would not have done; the estate might have been liable to specific incumbrances, which a fine would have let in: but it is not necessary to decide that. In fact, no recovery was suffered. The apology is, that there was scarcely an opportunity, and that there was no neglect: and it is argued, that if it was prevented by the act of God, it should be held as done; but there are many cases where the act is rendered impossible to be done, and yet the estate shall not vest. As an estate given to *A.* on condition that he shall infeoff *B.* of *Whitacre*, *B.* refuses to accept, the estate will not vest in *A.* Here, the estate was to be conveyed upon a certain act to be done, which amounted to a price: he was to take care, that, at all events, the estate of *Sarah*

Currer should be so conveyed as to go to the uses of *John Currer's* will. It is said, nothing is left undone but the execution of the deed: but this I may venture to deny. It is said, what he has done would have amounted to a conveyance: if he had been seised of a fee-simple, it might so; but he had only an estate-tail, with a fee-expectant, and could only bar by recovery. It is said, the estate-tail being spent, is now out of the case; and that therefore it is now the same thing. I think this is not so; *Henry Richardson Currer* should have taken care, that, at all events, the estate of *Sarah Currer* should be settled to the uses of *John Richardson Currer's* will. He had only a reversion; he had never such an interest as he could bind by an equitable disposition. I will not say whether it was absolutely necessary that a recovery should be suffered; but he ought, in his life-time, to have obtained such an estate as he could convey; therefore the daughter is not bound to convey *Sarah Currer's* estates.

As to the other two points; the estates *John Richardson Currer* could dispose of will go to *Roundel*; and the same arguments apply to the personal estate: it must therefore be laid out in land to the same uses.

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[*] TRINITY TERM,

[*75]

26 Geo. 3. 1786.

BENYON against MADDISON.

(No Entry.)

Master of the
Rolls for Lord
Chancellor.

LYNDE made his will, and, subject to his debts, was a clause by which he gave the whole of his estate to *John Maddison*, the defendant, "in order to pay the income to my mother *Hester Lynde* for life, my intent being that she should enjoy the same during her life: but, after the death of *Mrs. Hester Lynde*, I then give (1) to (five persons) the sum of 500*l.* each, 3 per cent. annuities, and to *J. Benyon*, and *Mary his sister*, the sum of 100*l.* each, 3 per cent. annuities. All the rest and residue I give to my executor; and I hereby empower him to dispose of by will the residuum he will be intitled to after the decease of my mother."

The mother is now dead; *J. Benyon* died in her life-time, and the plaintiff is his representative, and filed the present bill for the legacy of 100*l.* 3 per cent. given to him by testator's will.

Mr. Scott (for the plaintiff).—The only question is, whether the legacies vested. This is a distribution of the fund after the death of the mother. The testator did not mean to postpone the vesting of the legacies, but only the payment of them. This appears from the case of *Dawson v. Killet* (ante, vol. i. p. 119.) and the cases there cited, and

Bequest of all of testator's estate to *A.*, to pay the income to testator's mother for life, and after her decease, I then give to *A.* &c. the residue to *B.*, with power to dispose of it by will: the legacy to *A.* vested immediately, and was transmissible. (1)

(1) "When legacies are given, in the nature of remainders, at future periods, which must arrive, as in the instance of a bequest to *A.* for life, and after her death to *B.*, the interests of the first and subsequent takers will vest together, and although *B.* happen to die before *A.*, yet *B.*'s representative will be entitled after *A.*'s death." See 2 *Roper on Legacies*, 187, &c. which, *inter alia*, refers to the principal case. See also particularly *Barnes v. Allen*, *Monkhouse v. Holme*, and *Attorney-General v. Crispin*, *ante*, 1 vol. 181, 298, 300. & 386. and *Walker v. Main*, *Rolls*, 7 July, 1819.

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from *Barnes v. Allen*, *ibid.* 181. where the word *then* was used : but that word was not used by the testator here, as meaning to say, I do not mean to give *until then*. In *Monkhouse v. Holme*, *ibid.* 298. the words [*] were, and *from and after her* (the wife's) *decease* ; yet the legacy was held to be vested. It is impossible to distinguish this case from *Monkhouse v. Holme*. That case takes notice of *Norris v. Huthwaite*, where the Court relied upon the word *then*, and in *Smith v. Salmon*, there cited, in which the words were, *from and after her decease*, and the Court held it lapsed : but *Monkhouse v. Holme* was determined against both those cases.

Then as to the residuary clause, it is not sufficient to overturn the legal effect of the legacies in the will.

Mr. Mansfield and Mr. Mitford (for the defendant).—The single question is, whether the legacies to persons, since deceased, vested or not. The distinction has turned, in several of the cases, upon very trifling differences in terms. In this will, if in any, the legacies must be future. After the death of my mother I *then give*. This is future as strongly as can possibly be. Then the residuary clause, giving the executor power to dispose of his residue by will, shews his meaning to be to give him a power he would not otherwise have had ; and applying the same idea to the legatees, he certainly did not mean to give them that power. He, like other testators, did not know the meaning of the word *vesting*. Testators, in general, think the gift will not take place, but at the time of payment ; and, if the persons are not alive at that time, the legacy will not be payable. Suppose the interest here had not been given, and the legacy had been “ *at the death of my mother I give*.” The legacies, of persons dying in her life-time, would have been lapsed. A distinction has been made between a gift of the whole fund, and dividing the fund : this not being a gift of the whole fund, amounts to a gift at the death of the mother. What is mentioned as to the residuary legatee, that, if he died before the mother, the testator conferred upon him the power of disposing of his residue, no such power being given to the legatees, their legacies must lapse. *Norris v. Huthwaite* is almost on all fours with this, but not quite so strong. The words there were, I *then give*. Here it is, *after the decease of my mother, I then give*. In *Monkhouse v. Holme* the words were very loose. In *Barnes v. Allen* there was a direct gift. In *Dawson v. Killet* the words were, *if there should be no issue between them, then the premises* [*] *were given to the defendant, subject to the charges to be paid six months after the decease of the wife*. These are very different from the present ; and there was a clear vested interest in the real estate ; so that the gift was absolute, and only the payment postponed. None of the cases are very near this, but *Norris v. Huthwaite* ; *Smith* and *Salmon* has not the word *then* ; yet the Court held it lapsed. This construction is supported by the two cases, and by the strong marked intention of the testator. The gift is attached to the payment, which brings it within the rule of the civil law. The words are perfectly future, and the case falls within the reasoning of Lord Hardwicke, in giving judgment in *Billingsley v. Wills*, 3 Atk. 219.

[*77]

Master of the Rolls.—The cases have proceeded upon very nice distinctions. Nothing can be more truly called *vezata questio*, as appears from the rules laid down in *Hall v. Terry*, 1 Atk. 502. and *Lowther v. Condon*, 2 Atk. 127. 130. If this were a devise of real property, there is no doubt but it would be a vested remainder ; and it seems reproachful to the law, that the construction should be different when applied to different species of estates : but it is said that there is a rule of the civil law affecting this subject ; and undoubtedly the decisions of that court ought to have weight in this court. That rule appears from *Swinburne*

to be, that where it is clear that the intention of the testator was, that the legacy should be future, the law (and common sense supports it) says it shall not be paid, if the party does not support the character or situation required by the will. I take it the word *then*, in the present case, is not to be construed as an adverb of time; and I thought the question had been settled by the decisions. If it is of any weight what the opinions of the bar were, the case of *Norris v. Huthwaite* was decided against those opinions. The case of *Pinbury v. Elkin*, 1 Wms. 563. is worth looking into. The question was much discussed at the bar. The brother, in that case, died before the contingency happened, which was in favour of the executrix. In the case of *2 Ventris*, 347. there cited, the cases in *Swinburne*, which seem *contra*, were over-ruled. That case was approved by Lord *Parker*. I do not mean to remove the rule, that where a legacy to a person requires that he should acquire a particular situation, there the legacy shall not vest; or, in the cases of portions to children, that they shall not vest: but considering the [*] present as merely a money legacy, I think it does not fall within the rule. I must therefore decree the 100*l.* 3 *per cent.* annuities to be transferred to the plaintiff, with interest from the death of the mother.

1786.

BENTON
against
MADDOCK.

[*78]

HALE against WEBB.

(No Entry.)

Master of the
Rolls for Lord
Chancellor.

THIS was a bill filed by the plaintiff against the defendant, to whom he had been apprentice, praying for a return of a part of the apprentice-fee.

The plaintiff had been bound to the defendant, and a fee of 200*l.* given with him. About a year after, the mother sent to desire he might be discharged; to which the master at first expressed some dislike, but afterwards consented. They went before the chamberlain, and the indentures were cancelled; but nothing was said concerning the return of any part of the apprentice-fee.

It came before the Court last term, when Mr. *Madocks* (for the plaintiff) insisted, that this Court had a jurisdiction over this subject, and cited for that purpose *Newton v. Rowse*, 1 Vern. 460. and *Thurman v. Abel*, 2 Vern. 64.: in both which cases a return had been decreed. He said, by the custom of *London*, the chamberlain had an authority to discharge the apprentice, but none to direct the return of premium. The justices of peace have it by express act of parliament. (5 Eliz. c. 4.)

Mr. *Scott* (for the defendant) contended, that the chamberlain had this power, as incidental to his power of discharging, and cited 1 Salk. 68.

His Honor observed, — that no cause of discharge was stated in the bill; but that the master and apprentice disagreed. If the boy had not behaved grossly ill, he ought to have a return of part of the money; but, if the chamberlain had a jurisdiction, and had exercised it, he said he would not review it.

[The master of an apprentice and his mother consented to cancel the indentures, and which was done under the order of the Chamberlain of London, in the Mayor's Court, who determined nothing as to any return of the fee. Bill for a return of the fee dismissed. (1)]

(1) This decision was undoubtedly proper. In *Stephenson v. Houldich*, 2 Vern. 491. the Registrar stated to the Ld. K. and M. R. that on *certiorari* bills of this nature, the Court had sometimes retained the suit and determined it, but oftener sent it back to the Lord Mayor's Court.

Besides the cases above cited in the text, decrees for a return of the premium were made in two cases of great hardship by Lord *Nottingham C.*, *Lockley v. Eldridge*, and *Soam v. Bowden*, Rep. Temp. Finch. 124. 396. *Lockley v. Eldridge* is in Lord *Nottingham's MSS.* vol. 1. fol. 166.

1786.

HALE
against
WEBB.

[*79]

[*] It stood over for the purpose of examining into the jurisdiction of the chamberlain; and coming on again this term,

Mr. Recorder, Mr. Madocks, and Mr. Waller, for the plaintiff, — said, that the jurisdiction of the chamberlain only extended to the regulation of the conduct of the apprentice, not to a return of any part of the fee. That was matter of a bill in the Mayor's Court, as a court of equity, with which this court had a concurrent jurisdiction. It is unreasonable, and against good conscience, that the master should retain the whole premium, when he instructed the apprentice only for one year, especially when it is considered that the premium is for board, &c. as well as for teaching. In case of the bankruptcy of the master, a part of the premium is always returned.

Mr. Scott for the defendant. — The common practice, where it comes before the chamberlain by complaint, is for him to discharge the apprentice, and order a return of part of the fee. If the apprentice was discharged without this, he should have applied to the Mayor's Court. In the case of justices, the act gives them no authority to return the premium; but they do it as incidental to the authority to discharge. In this case, the only intention of the parties was, that the contract should be dissolved. The Mayor's Court have returned that judgment was given, upon a complaint, that the apprenticeship should be dissolved, the master having refused to receive the apprentice back; but in fact it was dissolved purely by consent.

Mr. Recorder in reply. — The answer admits a discharge by consent; the certificate of the judgment is upon complaint; but this is not proved in evidence.

No answer has been given to the cases cited, to shew that this court has exercised this jurisdiction. It is sufficient for us to shew that it has exercised a concurrent jurisdiction with the Mayor's Court. (2) The chamberlain has no authority to order a return of premium; and the parties not having agreed what was to be done, equity must take place. Where the apprentice is discharged for misconduct, he forfeits the premium; but, in this case, there is no misconduct stated in the answer: on the contrary, [*] the master acknowledges he was not willing to part with him.

[*80]

Master of the Rolls. — The facts of this case are, that *Hale* was bound to *Webb* with 200*l.* premium. That, about a year after, the mother wished to have him discharged; which, being consented to, and it being necessary the same authority should discharge which bound him, they went before the chamberlain, where an end was put to the contract. The bill contends, that a return of premium should take place. I asked the counsel, upon what head of equity they claimed this, and I was told upon accident; but what accident has happened I cannot find out. I do not meddle with the jurisdiction of the Mayor's Court, or with the cases here; but that before Lord *Jeffries* (*Newton v. Rowse*) carried the jurisdiction as far as could be, by returning a larger sum than that agreed for. In *Thurman v. Abel*, the master had put the apprentice (3) away. That has little to do with this case. Here, all the parties to the agreement are so to the dissolution. The master consented to the discharge. How is it to be understood that any thing further was agreed between them? Suppose this had been in consequence of gross misconduct, and the master agreed to the dissolution, it would be a forfeiture of the premium. Here, contemplating the whole case which was in consideration before them when they made the agreement, I cannot conceive this

(2) See the preceding note.

(3) So in *Lockyer v. Eldridge*, (Rep. Temp. Finch. 124.) the Master had treated him harshly, &c.

Court can have any jurisdiction. If it is because, *secundum æquum et bonum*, the master cannot retain the money, they might sue at law, since the introduction of the writ in *consimili casu*. The case of bankruptcy is a case of accident, and therefore this Court can relieve. On every view and ground of this case the *bill* ought to be dismissed.

1786.

HALE
against
WARR.CARNAN *against* BOWLES. [June 28.]

(Reg. Lib. 1785. A. fol. 449. h. — Entered *Carnan v. Paterson*.)

[Vide S. C. before Lord
Thurlow C.
1 Cox, 283.]

Master of the
Rolls for Lord
Chancellor.

IN 1771, Captain *Paterson*, having prepared a book of roads, sold all his interest in the copyright of it to the plaintiff *Carnan*, who printed it in letter-press, at the price of two [*] shillings. The author repeatedly improved the book, and was paid by the plaintiff for the improvements made to each edition; and the fourteen years being expired from the publication, and the author being still alive, he had the great roads engraved on copper-plates (the cross-roads remaining in letter-press) and sold the property in this improved edition to the defendant, who published it in two volumes in twelves, at the price of two guineas.

On the 22d July, 1785, Mr. Solicitor-General moved, on the part of the plaintiff, for an injunction against the defendant, to restrain him from selling this book, as being the property of the plaintiff. He was supported by Mr. *Madocks* and Mr. *Nedham*.

They made two questions, 1st, Whether under the 8 *Anne*, c. 19. such a property had resulted to Captain *Paterson*, at the end of fourteen years, as he could part with to the defendant. 2dly, Whether the present publication was the same book as had been sold to the plaintiff.

By the 11th section of the act of 8 *Anne*, it is provided, that, after the expiration of the term of fourteen years, the sole right of printing, or disposing of copies of books, shall return to the authors thereof; if they are then living, for a further term of fourteen years, but the question is, whether the conveyance of the author's property in the copy did not convey to the plaintiff his right to that contingent return. The words of the grant are, *all his right*, which must convey the contingent interest in the second term of fourteen years, as well as the absolute interest in the first fourteen. The power to assign must be co-extensive with the right given by the act. It was so understood in the case of *Millar v. Taylor*, 4 Burrow, 2303. that *Millar* took the whole right for twenty-eight years, if the author should be alive at the end of the first fourteen; and the same was held lately in the Exchequer, in the case of *Rennet v. Thompson*, where *Garth*, having composed music, and conveyed his property in a similar manner with *Paterson*, to *Thompson*, upon the expiration of the first term of fourteen years, sold his second term to *Rennet*, who, upon *Thompson's* continuing to sell the music, filed his bill for an injunction and account of profits: [*] the Court of Exchequer dismissed the bill, holding the whole right to pass by the first grant, and that the second grant to *Rennet* was only a project. 2. The book contains the same roads; the only difference is, that one is engraved on copper-plates, the other is in letter-press.

Mr. *Mansfield* and Mr. *Stanley* for the defendants. — The defendants in this case meant to act innocently. This is apparent by the great expence to which they have put themselves; and the fair construction of *Paterson's* grant is, that he meant to convey only what he had absolutely,

One having sold to a bookseller a book of roads which was printed in letter-press, after the expiration of the first fourteen years, sold it to another, who published the high roads upon copper-plates, and the cross roads in letter-press; as to the last an injunction was granted; the author having no resulting right as against his own assignee, after the first 14 years, and this being part of the former work, although the delineation on copper-plates is a new work. (1)

[*81]

[*82]

(1) See the last note to this case.

1786.

CARNAN
against
BOWLES.

the right of sole printing for fourteen years. There is not a suggestion in the bill that he meant to convey more. The expression in the act meant to secure something to authors, even against their own acts. It gives the right to authors and their assigns during the first fourteen years, and no longer, and then, by the proviso, the right shall *return to the authors* (not their assigns), if living; so that it is a personal bounty to the authors only. In selling the right, the author sells all that is in him, not the contingent right that may return to him. There is not a syllable in *Paterson's* grant that points to a contingent right; nor is there a case determined that points to the question as to the second right. In *Millar v. Taylor*, if *Thompson* had lived, the question would have been between them, not upon the common law right. No argument can be drawn from that case as to this question. The additions that he has made to it, from time to time, can have given the grantee no new right: but it is natural that he should have reserved so material an alteration as this for his new period, an alteration that has varied the whole work: for, 2dly, this is as different from the former work as any two works of this nature can be. They must all be considerably alike, as being descriptions of the same places. *Ogleby, Kitchen, et Britannia delineata*, must all essentially be the same. Unless the plaintiff's right be very clear, the court will not enjoin the defendant not to sell, especially under the circumstances of this case, where, if the plaintiff should not ultimately succeed, the defendant can have no remedy for the delay: and where, though the work was published last *Christmas*, it was unattacked then; and no bill was filed till upon the eve of a long vacation, the time when books of this kind have best sale.

[33]

[*] Mr. *Solicitor-General* in reply. — The first question with respect to the right to the copper-plates, is of great consequence: the second, as to the identity of the two works, is of little importance. With respect to the author's second term, he has an absolute and a contingent right; they are both capable of being disposed of. The counsel on the other side have stated nothing in the act to make a difference between them. The *return* is only between the public and the author, not between him and his assignee. There are no negative words in the act to prevent his assigning that, as well as his other rights. In many cases, if he could not assign it, the disability would be productive of great inconvenience. This brings it to the improvements; and the question will depend much upon the nature of them. If the improvements are mere additions of what was imperfect, they are only part of the original work; if they are surveys of different roads, they constitute a new work. The additional parts here are maps; in all other respects it is an exact copy. There is no additional mental labour in the composition; if there were, we should have no ground: the alterations are merely colourable. The reason we have not applied sooner is, that until now the inconvenience has not been felt.

Lord *Chancellor*. — My doubts are upon the improvements in the maps of those roads which were included in the former book. If a man makes a new survey of roads from actual measurement, I am not prepared to say that it is not a new work. Here it is a question, whether they are not all original works. In this case it is not an operation of the mind, like the *Essay on Human Understanding*; it lies *in medio*: every man with eyes can trace it; and the whole merit depends upon the accuracy of the observation: every description will therefore be in a great measure original. If this be so, every edition will be a new work; if it differs as much from the last edition as it does from the last precedent work: either all are original works, or none of them. With respect to the first point, it strikes me that the contingent interest must pass by the word

interest

interest in the grant. He conveys *all his interest in the copyright*: the assignment must have been made upon the idea of a perpetuity; and it is probable not a syllable was said or thought of, respecting the contingent right. They merely followed the old precedents of such conveyances. [*] It must, I think, be considered as conveying his whole right. If he had meant to convey his first term only, he should have said so. It is an extremely difficult thing to establish identity in a map, or a mere list of distances: but there may be originality in casting an index, or pointing out a ready method of finding a place in a map. In the work *Paterson* sold to *Carnan*, there seems to be something of this sort of originality. It must however be referred to the Master to examine into the originality of the book. (2)

The Master having made his report that the works were different, *Carnan's* being in letter-press, *Bowles's* upon copper-plates or charts, and the cross roads in letter-press: that they both contained the principal roads in *England*, together with the cross-roads, and only the high roads in *Scotland*. That, in *Bowles's* book, the high roads in *England* only were engraved, and the two others in letter-press; and the only difference between them was, that the one went upwards on the page, the other downwards; and that the letter-press roads were substantially the same in both.

Mr. Solicitor, supported by Mr. *Madocks* and Mr. *Scott*, moved for an injunction on this ground, with respect to the letter-press roads only; and abandoned the first point agitated before, with respect to the claim to the second term.

Mr. *Mansfield* and Mr. *Stanley*, for the defendants, argued, that there was no ground for an application for an injunction, after the Master's report, that the works were not the same. That in a case where *Sayer*, the print-seller, brought an action for pirating charts, Lord *Mansfield* held charts not to be within the statute; and that the original application to enjoin the whole work was now lowered to the restraining the letter-press, which would just have the same effect as restraining the whole work.

Master of the Rolls. — As my Lord Chancellor has referred it to the Master, he thought it not necessary for the plaintiff to establish his title at law; and that the nature of the transaction was such as to admit of an injunction. The facts appear upon [*] the Master's report. For the delineation, which is there described as different from the former book, the defendant cannot be restrained; but, if he has added any thing to it, in which he had no right, that he may be restrained from publishing. In the case of *Mason v. Murray*, the principal parts of Mr. *Gray's* poems had been published many years. Mr. *Mason* having published a life of Mr. *Gray*, in which he had introduced other poems of Mr. *Gray*, till then unpublished, *Murray*, in a new edition of *Gray's* poems, published those additional ones. Mr. *Mason* filed his bill, and had an injunction and an account as to those additional poems. In the present case, there is no difficulty in distinguishing what belongs to Mr. *Carnan*; nor does it make any difference that it constitutes only a small part of the publication. Suppose it was only adding plates to an edition of *Don Quixote*, the mere act of embellishing could not divest the right of the owner in the text. As to the delineation, the Master has reported that to be a different work; but, *with respect to the letter-press, he has reported that it is nearly the same*; *Carnan's* property is therefore

(2) The like was afterwards done in ——— v. *Leadbetter*, 4 Ves. 681.: but the Court now more generally takes upon itself to decide without any reference.

certainly

1786.

CARNAN
against
BOWLES.

[*84]

[*85]

1786.

CARNAN
against
BOWLES.

certainly injured by the publication of the letter-press; as to which he must have an injunction. (3)

(3) See R. L. accordingly. The matter coming before Lord *Thurlow*, upon a motion to dissolve the injunction, Mr. Cox states his Lordship to have observed, "that as the roads of *Great Britain* were open to the inspection and observation of all mankind, every one was at liberty to publish the result of such observation: the subject-matters of these books were therefore *in medio*: but the question will be, whether the author has exhibited any new and distinct idea in the exposition of them; and then, whether the subsequent editor has, in substance, adopted the same. When globes were first invented, this was a new scheme of exhibiting the face of the earth, different in substance from the plain chart. Now, then, the addition of a few places on the globe will not make a new invention, the *substratum* being the same. So in the case of *Newton's Milton*, the Court thought that *Milton's* works were *in medio*, but the notes and other additions were not so; and therefore, as to them, restrained the publication, though they left the text open to any body. Now, here, if the scheme of exhibiting this information to the public is substantially and fundamentally the same in the second work as in the first, and the former is merely reprinted, with such differences as not to amount fundamentally to a different project of exhibition, the law ought to interfere and protect the exhibition. His Lordship thought the report not sufficiently clear, and directed that it should be again referred to the Master, whether the books were the same, or whether the latter differed from the former so as to render the same a new and original work in any and what particulars."

It is said, that Lord *Thurlow* afterwards dissolved the injunction generally; thinking the second work, though containing the same matter, original in itself. See 5 Ves. 25. *Cory v. Faden*, 5 Ves. 24. was determined under a similar impression; but such doctrine appears very questionable, and has been over-ruled by later very sound determinations. Lord *Eldon* C. has often granted and maintained injunctions against parties publishing, in any work common to each party, any matter which has been the composition of another; as in the instance of *Trusler's Chronology*, the case of a work, called "*Time's Telescope*," &c. In a case of doubt, the Court has of late directed the plaintiff to bring an action, and maintained the injunction in the meanwhile. See *King v. Reed*, 8 Ves. 223. note.

In a plain case of piracy, *Pinnock v. Rose*, *Lincoln's Inn*, 10 July, 1819, Sir J. *Leach*, Vice Ch., directed the injunction to "restrain the publication of any works or work in which the matter of the plaintiff's publication, or any part thereof, was verbally or substantially introduced."

[*Vide* S. C.
1 Cox, 250.]

Master of the
Rolls for Lord
Chancellor.

Residue of 3
per cent. annu-
ties given to the
two daughters
of T. S. He
had three
daughters
[when the will
was made]:
they shall all
take equal
shares. (4)

STEBBING against WALKEY.

(Reg. Lib. 1785. B. fol. 503. b.)

[*MARY STEBBING* gave to the two daughters of Mr. *Titus Stebbing* 10*l.* each; and appointed her mother in law, *Margaret Harriet Stebbing*, executrix. The said *Margaret Harriet Stebbing*, by her will,] gave 82*l.* 3 per cent. annuities, the residue of 182*l.* annuities, in trust, to pay the same unto and between the two daughters of [the said] *Titus Stebbing*, in equal shares and proportions, during (1) their lives, and, if either of them should die (2), then to pay the whole to the survivor of them; and, in case both should depart this life (3), then the whole was to fall into the residue, and she appointed *Walkey* and *Ritson* residuary legatees, [and joint executors of her will].

Titus Stebbing had three daughters, the plaintiffs.

Mr. *Scott*, for the plaintiffs.—This will can admit but of two constructions, either the two eldest daughters of *Titus Stebbing* must take, or the word *two* must be rejected, and all the daughters must take.—

(1) "So much of the term to come therein as they should live," &c. Reg. Lib. and 1 Cox, 251.

(2) "Before the expiration of the said term." *Ibid.*

(3) "Before that time." *Ibid.*

(4) See 1 Roper on Legacies, 114. and the cases above referred to.

Sleech

Sleech v. [] Thorington*, 2 Ves. 560. is a bequest to the two servants who should live with the testatrix at the time of her decease; at the testatrix's death, she had three servants, and they all were decreed to take equal shares. In that case, [pp. 564, 565.] *Tomkins v. Tomkins* (5), in 1745, was cited, where the testator gave to the three children of his sister 50*l.* each; the sister had four children, and they were all let in. In *Scott v. Fenhoulet*, in 1779, (as to this point, not reported,) (6) there was a legacy given to Captain Compton, and each of his two daughters, if each or either of them should survive Lady Chadwick. Captain Compton had more than two daughters, and it was held, that all the daughters should take.

Mr. Price and Mr. Emlyn, for the residuary legatees. — One great line of distinction between this case and that in Vesey, is, that in that case no particular servants were in view; in this, there is a particular identification of the two daughters, and, if either of them shall die, to the survivor; if both shall die, then to the residuary legatee.

In that case, the decision was *ut res magis valeat quam pereat*; here there is a direction that it shall fall into the residue. — The case of *Scott v. Fenhoulet* is different from this; it was to Captain Compton, and each of his daughters: the mistake was only in point of number, but in this case, three were not intended to take the annuity, it was intended that only two should take it. It must be determined by reference to the Master, which are the two. If three take, it will postpone the residuary gift for another life, and contradict all the terms of the legacy.

Master of the Rolls. — In construing wills, courts ought not to indulge conjecture; it were much better that many wills should be defeated. In this case, I am not prepared to control the cases which have been determined. When rules are laid down, they ought to be such as meet the common sense of mankind. I acknowledge, on the present subject, I yield to the authority of the cases, and not to the reason of them; but on the authority of the cases, I must declare that all the daughters shall take. (7)

(5) *Tomkins v. Tomkins* is also cited, 3 Atk. 257. The Editor has a MS. report of it; the judgment in which (so far as relates to the present point) is as follows: — Lord Chancellor. — As it hath been agreed that the legacy should extend to the four children, "it is not necessary to give any opinion upon it; but I should have thought it a favourable case for all the children, if the testator had expressed it to all her three children, and would certainly have taken in all the children; and the addition of the word three must have been rejected as repugnant. In the present case, it is not said all, but her children are definite words, and to be construed universally. And, if it was not to extend to all, the legacy would be void for want of knowing which of the three should be entitled."

(6) The point in *Scott v. Fenhoulet* came on to be reheard in 1784; and is now reported 1 Cox, 79. The bequest was to the same effect with the above; and determined accordingly.

(7) After a declaration that all the three daughters were entitled to legacies of 10*l.* each under the will of Mary Stebbing, the Court declared, that under the will of the [second] testatrix, Margaret Harriet Stebbing, the 82*l.* per annum short annuities, therein mentioned, ought to be divided into three equal parts between the said three daughters of the said Titus Stebbing; with benefit of survivorship amongst them." Reg. Lib.

1786.

STEBBING
against
WALKER,
[*86]

1786.

[*87]

*Master of the
Rolls for Lord
Chancellor.*

Testator gives a debt due from his brother *John*, on bond of 300*l.* [and upwards,] to three. — The debt was due as executor, 200*l.* by bond, 100*l.* by covenant, and 50*l.* on account of a legacy, [remaining due from him. Held, that the whole amount of the sums thus due, viz. 350*l.* should be] divided among the three.

The bank being made parties, to discover what sum the executrix had transferred into her own name, — need not be brought on to a hearing: the plaintiffs, therefore, ordered to pay their costs. (1)

[*88]

[*] WILLIAMS against WILLIAMS.

(Reg. Lib. 1785. B. fol. 574. b.)

WILLIAM WILLIAMS made his will, in which was the following clause: "Whereas my brother *John* stands indebted to me, by bond, in the sum of 300*l.* and upwards, now I dispose of the same as follows: one-third thereof to the said *John*, one third to *Nicholas*, and one-third to *Thomas*;" [and gave the residue of his lands, and his personal estate to his wife, whom he appointed sole executrix]. *Nicholas* and *Thomas* were the other brothers of the testator.

The debt due from *John* was as executor of another *Nicholas Williams*, who was indebted to the testator in 200*l.* by bond, 100*l.* by covenant, and had bequeathed the testator a legacy of 50*l.* [which was unpaid, and remained owing to him by *John*.]

The bill was filed against the executrix, claiming, on behalf of *Nicholas* and *Thomas*, third parts of the whole of *John's* debt.

Mr. Mansfield (for the plaintiff) insisted the brothers were so entitled, and that the testator intended such division, and merely mistook the security upon which *Nicholas* was indebted.

Mr. Scott (for the defendant) contended, that only the 200*l.* secured by bond was to pass to the brothers; and the testator's mistake was a mistake of the quantity secured by bond, he meaning only to give the sum so secured.

Master of the Rolls. — I have no difficulty in declaring what the testator intended to give, though the expression does not describe the situation of the money. *Mr. Scott* thinks only the money secured by bond will pass; I think the testator thought of the quantity of the property. He had three relations, and he meant to give them the 300*l.* which were due to him from *John*; he therefore meant to include all *John's* debt.

There was a matter arose in this cause as to costs. The testator had laid out 500*l.* or thereabouts, in the purchase of 3 *per cent.* consols, which produced about 800*l.* stock.

The residue being given to the defendant for life, and, after her decease, to the children of *Thomas*, she transferred the stock into [*] her own name. Upon application to her by the plaintiffs, to know what the residue was, which would come after her decease to the children of *Thomas*, she answered, about 400*l.* (meaning, as she said afterwards, by her answer, the money laid out.) The plaintiffs, by their bill, made the Governor, &c. of the Bank parties, and brought them on to the hearing. This his Honor objected to as an unnecessary expence.

Mr. Mansfield argued that it was not so; because, in practice, the *subpœna* being served, operated upon the Bank as an injunction, and prevented their permitting the executor to transfer, which they never would do after service of the *subpœna*.

His Honor said, — although this was so in practice, it was not so in law; as the *subpœna* served would not be an answer to an action for

(1) "In *Darlington v. Allen*, 16 Nov. 1786, His Honor, in a similar case, directed the plaintiff to pay to the Bank all their costs subsequent to their putting in their answer, but would not give them out of the funds. And he desired the bar to take notice, that he considered the practice of bringing the Bank to a hearing as totally unjustifiable, though it might be necessary to serve them with *subpœna*, and get their answer." From *Mr. Cor's MS. notes*.

not permitting a transfer, although an injunction would (2): and declared it improper to bring the Bank to an hearing, and, on that account, ordered the plaintiffs (3) to pay the costs of the Bank, as against whom the bill was dismissed; and as against the executrix, an account of the testator's estate and effects, the debt due from *John* to be paid as aforesaid, (4) the residue to be transferred to the accountant-general, the interest to be paid to the widow for life, and then among the children of *Thomas*; the other costs out of the assets of the testator.

(2) The practice of the Bank, upon notice of any dispute, is to withhold a transfer for some short limited time, in order to give the party opportunity to apply for an injunction: if he does not avail himself of it, a transfer will be permitted of course.

(3) See note (1) *antea*.

(4) "Declare that the bequest in the will of the testator *W. W.* of the sum of 300*l.* and upwards, due by bond from his brother *John W.*, and thereby given in thirds to the defendant *J. W.* and the plaintiffs *T. W.* and *N. W.*, according to the true construction of the said testator's will, includes the sum of 200*l.* due on bond from the defendant, the said *J. W.*, as executor of *Nicholas W.* deceased; the sum of 100*l.* also due from the said defendant *J. W.* as executor as aforesaid under the covenant of the said testator *Nicholas W.*; and also the legacy of 50*l.* due from the said defendant *J. W.* as executor as aforesaid for the legacy given by the will of the said testator *Nicholas W.*" Reg. Lib.

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against
WILLIAMS.

HORTON against WHITAKER. [26 June & 25 July.]

(Reg. Lib. 1785. A. fol. 730.)

Master of the
Rolls for Lord
Chancellor.

HIS Honor directed a case to the Court of King's Bench; saying, he thought he had authority so to do when sitting for the Lord Chancellor, though not when sitting at the Rolls.

[The case was argued 27th June, (absente Lord Mansfield,) and returned with a certificate from the three *puisne* Judges. — Vid. 1 T. R. 346.]

STRATHMORE against BOWES. [1 & 11 July.]

[Vide 8 C.
2 Dick. 673. &
1 Cox, 263.]

Master of the
Rolls for Lord
Chancellor.

MR. Mansfield moved for an injunction to restrain the defendant from committing waste, by cutting down timber in the avenues, &c. of the estate of the late *Mr. Bowes*, at *Gibside*.

[*] By the settlement on the marriage of the late Earl of *Strathmore* with *Miss Bowes*, he was made tenant for life, without impeachment of waste, except voluntary waste in houses, remainder to Lady *Strathmore*, (then *Miss Bowes*), in like manner, remainder over to the present Earl, &c. After the death of Lord *Strathmore*, the defendant intermarried with Lady *Strathmore*, and, being seised in her right, (but living separate from her,) had committed great waste in cutting timber, and marking other timber to be cut; among the rest, young saplings, not usually cut in the course of cutting timber.

Injunction for
waste against
tenant for life,
without im-
peachment of
waste. (1)
Affidavits read
against the
answer in sup-
port of in-
junctions to
stay waste. (2)

[*89]

The injunction moved for was, to restrain him from cutting timber, or doing any waste in the rides or avenues to the house, or cutting timber

(1) See *Chamberlayne v. Dummer*, *antea*, 1 vol. 166, 167, 168. and the notes.

(2) See the practice, as at that time, accordingly stated by *Mr. Dickins*, the Registrar, 2 Dick. 673.

that

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that was of shade, or ornament (3) to the house, and trees unfit to cut as timber.

The defendants insisted they had neither cut nor marked any saplings, or improper timber, or any trees near the house, but in rides through the woods, a mile from the house. (4)

His Honor granted the injunction, saying, it ought to include every thing useful or ornamental to the house. A ride through a wood is most constitutive to the beauty of the place. He thought himself bound to grant an injunction as to the ornamental trees, though they should not be planted trees, but trees growing naturally. (5) He therefore directed the injunction to be in the terms of *Mrs. Dummer's* †, and to extend to cutting young saplings, and trees not fit to cut as timber.

On the last day of the term, the answer, in the mean time, being put in, by which the defendant swore that he had not cut, nor intended so to do, any timber, or ornamental trees, or any saplings, although the woods received injury from some of them not being weeded out, and the plaintiff not having excepted to the answer, the defendants moved to dissolve the injunction.

His Honor said, — the answer not being excepted to, and being full, must be taken to be true; and therefore he must discharge the rule, although the time for excepting was not expired; and that, upon exceptions filed, the injunction would revive.

[*90]

[*] *Mr. Mansfield* afterwards said, — he found he was misled as to the practice, that he ought to have read the original affidavits upon which the rule was granted, in reply to the answer, and that this was the practice in cases of waste.

His Honor doubted the practice, and ordered it to stand over, in order to enquire into it. (6)

At the first seal after term, the affidavits were read, by consent (7), and the injunction dissolved.

† *Ante*, 1 vol. p. 166.

(3) The Court, however, refuses to speculate on what is ornamental or not, and confines itself to what has been planted for ornament. See note to 1 vol. p. 166. *M. Downshire v. L. Sandys*, 6 Ves. 107, 110, 111, 112. 8 Ves. 70, 71, &c.

(4) *Vide* 7 Ves. 309.

(5) This part of the report must be taken with caution, after the observations of Lord Eldon, above referred to. It is evident here that the trees were ornamental, as *adorning the rides which had been cut through the woods, although the individual trees might not have been planted for ornament*. The case, therefore, did not require the stress which Lord Eldon laid on the latter, as a requisite in general cases. See the note to 1 vol. 166, 167.

(6) See the circumstances fully, and *Mr. Dickins* the Registrar's certificate, that affidavits might be read against the answer in cases of waste, 2 Dick. 673. and 1 Cox, 263. *Vide* also *Norway v. Rowe*, 19 Ves. 144, &c. and *Robinson v. Ld. Byron*, 1 vol. 588, 589. and the note.

(7) The consent was given inadvertently. *Vide* 2 Dick. 676. *Et vide* 19 Ves. 153, 154.

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THOMAS STEPHENS, Executor of GEORGE STEPHENS, Plaintiff.

EDWARD OLIVE, Senior, and JANE his Wife; DEBORAH MIGHELL, Executrix of SAMUEL MIGHELL, SAMUEL DRAWBRIDGE, and SUKEY his Wife; JOHN OLIVE and EDWARD OLIVE, Infants; which SUKEY DRAWBRIDGE and JOHN and EDWARD OLIVE are the Children of said EDWARD and JANE OLIVE; THOMAS CRIPPS and RICHARD WATTS, and others, Defendants.

Master of the
Rolls for Lord
Chancellor.

Lincoln's Inn
Hall, 14 July.

(Reg. Lib. 1785. B. fol. 758.) (1)

EDWARD OLIVE, senior, after his marriage, by indentures of lease and release, the release dated 7th May 1774, settled his real estate on himself for life, with remainder to Jane his wife for life; remainder to *Thomas Cripps* for 500 years; remainder to his first and other sons in tail; remainder to his daughters in tail; remainder to himself in fee. The trusts of the term were for raising portions for younger children. By another deed of the same date, he mortgaged the said estate to *Philip Mighell* for a term of 1000 years, to secure the repayment of 500*l.* and interest. On the 6th March 1775, he became indebted by bond, to *George Stephens* in 200*l.* By indentures of lease and release, dated 19th and 20th December 1775, reciting [*] that he and his wife had agreed to live separate, he conveyed his life-estate in the said premises to *Samuel Drawbridge* and *Richard Watts* in trust, out of the rents and profits, to keep down the interest of *Mighell's* mortgage, and to pay all taxes and repairs, and then to pay 35*l.* per annum to Jane his wife for her separate maintenance; next 35*l.* per annum to himself; and, if there should remain any surplus, to add the same to his wife's annuity, or to his own, at the discretion of the trustees, or to preserve the same, to accumulate for the benefit of his son. The trustees covenanted to indemnify the husband against the debts his wife might contract after the separation. Soon after the execution of the deeds, the trustees took possession of the estate. In Michaelmas Term, 1781, *Thomas Stephens*, the executor of the said *George Stephens*, obtained judgment against *Edward Olive* on the said bond, and having sued out a *fi. fa.* levied 70*l.* He afterwards sued out an *elegit* (4) into the county of *Sussex*, where the said real estate, comprised in the several deeds aforesaid, lies: but the jury who were summoned, found, by their inquisition, that *Edward Olive* was not seised of any freehold estate in that county; whereupon *Thomas Stephens* exhibited his bill in this Court against *Edward*, and

A settlement after marriage, by a person not indebted, is not within the statute of fraudulent conveyances. (2)

On a deed of separation, the trustees indemnifying the husband against the wife's future debts, is a valuable consideration, and takes the conveyance out of the statute. (3)

[*91]

(1) "The cause first came on 31 March, 1785; and was ordered to stand over, the plaintiff not having sued out an *elegit*." From *Ld. Redesdale's notes*.

(2) See also *Lush v. Wilkinson*; 5 Ves. 384.; with *Kidney v. Cousmaker*, 12 Ves. 236. 255, &c., and the several cases cited; especially *Ld. Townshend v. Windham*, 2 Ves. 10, 11. and Supplement, 247. A voluntary settlement or conveyance, however, though good against subsequent creditors, is void against a subsequent purchaser for valuable consideration, under the stat. 27 Elis. c. 4. See in *Ld. Townshend v. Windham*, 2 Ves. 10, 11, and the references in the Supplement, 247. *et Copis v. Middleton*, 2 Madd. Rep. 430. Lord Eldon C. held, that the surrender up of a voluntary bond valid between the parties, though void against creditors, might operate as a good consideration for a substituted bond, even as against creditors, where no fraud. *Vide ex parte Berry*, 19 Ves. 218. It should seem, however, that the Courts would be very jealous and vigilant in such instances.

(3) *S. P. Worroll v. Jacob*, 3 Merivale, 256. See the elaborate judgment there from p. 261. especially 268, 269, 270.

(4) See note (1) *antea*.

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against
OLIVE.

Jane his wife, *Deborah Mighell*, executrix of *Philip Mighell*, the mortgagee, the children of *Edward* and *Jane Olive*, the trustees in the two settlements, and others, praying that the settlement might be declared void, and set aside as against the plaintiff, as being voluntary, and without consideration; and that the estate comprised therein might be sold, and the purchase money, after satisfying the mortgagee, applied towards payment of what remained due to the plaintiff on the said bond.

The cause came on to be heard before the Master of the Rolls, sitting for the Lord Chancellor. There was no evidence that *Edward Olive* was indebted at the time of making the settlement of 7th May 1774, except in the said sum of 500*l.* to *Philip Mighell*, which was secured by mortgage.

Mr. *Mansfield* and Mr. *Bicknel* (for the plaintiff) insisted, 1. that the settlement of 7th May 1774, would have been void, as against him, even if the settlor had not been at all indebted at the time; but, if that were doubtful, that his debt to *Philip* [*] *Mighell*, although secured by a mortgage, made such settlement void.

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And, 2. that the settlement of 20th of December 1775, being made subsequent to the plaintiff's debt, was clearly void. To prove these positions they cited *Taylor v. Jones*, 2 Atk. 600. *Fitzer v. Fitzer*, 2 Atk. 511.

Mr. *Ainge* (on the other side) cited [*Russell v. Hammond*, 1 Atk. 15. *Walker v. Burrows*, 1 Atk. 94. and *Lord Townshend v. Windham*,] 2 Vesey, 11. His Honor [Sir L. *Kenyon*] held, 1st, that a settlement, after marriage, in favour of a wife and children, by a person not indebted at the time, was good against subsequent creditors, and not within the 13th of Eliz. On this point he relied chiefly on what Lord *Hardwicke* says in 2 Vesey, 11.

2d. That although the settlor was indebted, yet, if the debt was secured by a mortgage, the settlement was good.

Therefore he held that the first settlement was valid.

3d. That the covenants by the trustees in the second settlement to indemnify the husband against the debts which the wife might contract after the separation, was a valuable consideration; and therefore that this settlement, although made after the debt due to the plaintiff, was contracted, was also good against him. (5)

After his Honor had delivered his opinion on the validity of the two settlements, the plaintiff's counsel contended, that the plaintiff, being a creditor, had a right to redeem the mortgage, and to hold the estate till the mortgage money was satisfied; and then, supposing the settlements to be valid, to retain so much out of the rents as was reserved to the husband by the settlement of December 1775. But his Honor said, the plaintiff's debt being only a specialty at the time of the second settlement, he was not intitled to any advantage over the wife; on the contrary, she had a better title under that settlement; and the person next intitled after the mortgagee could alone be suffered to redeem. (6)

His Honor decreed, that a receiver (7) should be appointed, who was
to

(5) See the cases in note (3) *antea*. And note the observations of Lord *Eldon* C. upon this decision in *Lord v. Lady St. John*, 11 Ves. 536, 537.

(7) It seems that if a prior mortgagee refuses to take possession, a subsequent mortgagee may insist upon a receiver being appointed, with directions to keep down the interest: and Lord *Thurlow* C. appointed a receiver, at the instance of one of the mortgagors, to keep down the mortgage interest, unless the mortgagee chose to take possession, although the mortgagee opposed the application. The case in the MSS. with which the Editor has been honoured by Lord *Colchester*; is as follows:—
“ *Newman v. Newman* and others. In Chancery, Sittings after Mich. Term, 1789—
“ [12 Dec.

to keep down the interest of the mortgage, in the first place, [*] then to pay 35*l. per annum* to the wife, according to the trusts of the settlement of December 1775, and to pay into the Bank the 35*l. per annum*, reserved by that settlement to the husband, [or so far as the residue of such rents and profits would extend, R. L.] as there might be other incumbrances on the said estate. †

The counsel for the mortgagee was not authorised to consent to the appointment of a receiver, but his Honor said he might apply to the Court if he wished to get into possession. (7)

† A similar decision to the above was made in the cause of the *King v. Breven* (8), *Chelmsford Assizes*, 1786, before Lord Loughborough.

That was an issue arising upon a traverse to an inquisition on an outlawry. Upon the inquisition the sheriff had returned against the estate in question, as the property of the outlaw. It was objected by the defendant that the estate was vested in him as a trustee.

The husband made a settlement of the estate upon his wife, after marriage. Upon their agreeing to live separate, the estate was conveyed to trustees, (of whom the defendant is the survivor,) for the use of the wife; and they covenanted to indemnify the husband against her debts.

It was objected, that this conveyance was within the statute of Eliz. against fraudulent conveyances.

Lord Loughborough, without entering into the question, whether the statute of Eliz. applied to the king, said, that the statute operated upon conveyances made by the husband to the wife, after marriage; but that this was a deed made upon a valuable consideration, the trustees undertaking to indemnify the husband against the debts of the wife, which was a sufficient valuable consideration to take it out of the statute; and upon that a verdict was found against the king.

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" [12 Dec. Lord Redesdale's note.] Bill by F. N., wife of defendant F. N. jun. Receiver appointed in place of negligent trustees, with order to keep down the interest of a mortgage, unless the mortgagee chose to take possession, notwithstanding the mortgagee opposed the appointment.

" F. N. sen. her father, and F. C. N. an infant, her daughter, against defendants F. N., S. P., and W., trustees under a marriage settlement, and Tucker, mortgagee of estates settled, by virtue of a mortgage in which the wife had joined by a fine. The bill stated a marriage settlement, by which trustees had engaged to pay, 1st, 100*l.* to the wife as a separate maintenance, residue of rents and profits to the husband, with remainders over; that a separation had taken place; and after that trustees being in possession, there had been the 100*l.* paid to plaintiff for two years; since that, only small sums on account, and for the last two years nothing.

" Defendant, F. N. jun., had filed a cross bill, in which he insisted he had been tricked into the execution of the settlement after marriage, his father-in-law having made an engagement which he never kept.

" Mitford (for plaintiff) — moved that a receiver might be appointed, who should take rents and profits, and pay over the 100*l. per annum* to plaintiff F. N.

" Solicitor General opposed it on the part of the husband, and on the ground disclosed in the cross bill.

" But the Chancellor. — There is a clear breach of trust in the trustees; they have paid over the whole to the husband, and, at any rate, you must give this woman some support. How could she have alimony, but by some such deed? Do you want to starve her?

" Lloyd opposed it on the part of the mortgagee; and said, that no such order could be made against him.

" Mitford answered. — That he was not in possession: that such an order might be made by the course of the Court, subject to the mortgagee being let into possession if he chose it. When a second incumbrance comes before the Court, he may insist on the first incumbrancer taking possession, or that a receiver may be appointed. The rents and profits are so large, that they will discharge the mortgage in three years.

" The Chancellor granted it accordingly.

" Nota. — The bill charged that the mortgage was obtained by fraud, and prayed that if the mortgage turned out to be good, the rents and profits might be applied to keep down the incumbrance." — From Lord Colchester's MSS. So also 1 Cox, 422. 2 Cox, 378, &c. Marq. Donegal, before Lord Eldon C. 12 Feb. 1803. S. P. MSS. Et Anon. 3 Aug. 1803, when Lord Eldon C. said, the practice was first introduced by Lord Thurlow and Lord Kenyon when M. R.

(8) Vide 2 Madd. Rep. 431. and 3 Meriv. 270.

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[*94]

[*] BATSON *against* LINDEGREEN.

(Reg. Lib. 1785. A. fol. 797.)

*Lincoln's Inn
Hall, 17 July.*

Devise to sell the residue (after payment of debts) and the money to be part of the personal estate; upon a total insolvency held to be equitable assets. (2)

THE testator *Lindegreen* after a direction for the payment of his debts and several legacies, devised the rest of his estates, real and personal, after payment of his debts, legacies, and funeral expences, and liable thereto, to trustees upon trust, *to sell and dispose of the same*, and in the mean time to set the same to tenants, and that the money to arise from the sale thereof (2) *should be placed, and deemed part of his personal estate.*

A bill had been filed (the estate proving totally insolvent) by a simple contract creditor, and heard before his Honor at the Rolls, who had decreed the money to be equitable assets, but the specialty creditors were not parties to that cause. — They filed the present bill.

Mr. *Mansfield*, Mr. *Scott*, and Mr. *Bicknel* (for the plaintiffs). — The reason in *Newton* and *Bennet* for holding the money to be equitable assets, was, that the descent was broken, which it is not in this case; for here the estate descended to the heir until the debts were paid, and then, was to go clear from them to the trustees, and to be deemed part of the personal estate, and as it descended to the heir it would be legal assets, and so likewise, when it became personal estate, it would be legal assets, and the specialty creditors must be paid before those by simple contract. There is a case in *Peere Williams* (*Freemoult v. Dedire*, 1 Wms. 429.) that wherever the estate descends it is legal assets; and although there has been an idea since the case of *Silk v. Prime* (in the note upon *Newton v. Bennet*, Bro. Ch. Rep. 138.) that the assets are equitable, yet there is no case against that in *Peere Williams*.

Lord *Chancellor*. — You construe the word *after* as an adverb of time, which I do not take it to be in this will.

A devise to the heir to sell, would make the produce equitable assets; and a charge is a devise *pro tanto*. (3)

His Lordship therefore directed the money to arise from the sale of the estates to be applied as equitable assets.

(1) See *Newton v. Bennet*, and *Davis v. Topp*, *antea*, 1 vol. 135. & 524, &c. with the notes. *Et vide per Lord Eldon C.* on the principal case in *Bailey v. Ekins*, 7 Ves. 322.

(2) "And from the rents and profits until sale." Reg. Lib.

(3) *Vide* 7 Ves. 322, 323, &c.

[*95]

Between JOHN KIRKMAN, ROBERT KIRKMAN, MARIA KIRKMAN, and ANNE KIRKMAN, the four surviving Children of JOHN KIRKMAN the Younger, Esq. late one of the Aldermen of the City of *London*, deceased, Infants; by SAMUEL KIRKMAN, their Uncle, and next Friend, Plaintiffs.

MARIA KIRKMAN, Widow and Administratrix of the said JOHN KIRKMAN, her late Husband, deceased, and also Administratrix of SAMUEL KIRKMAN, the other Child of the said JOHN KIRKMAN, deceased,

ceased, who died an Infant, and WILLIAM HUSSEY, Esq. surviving Trustee, named in the Settlement made on the Marriage of the said late JOHN KIRKMAN, and MARIA his Wife, Defendants.

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(Reg. Lib. 1785. A. fol. 823.)

Lincoln's Inn
Hall, 17 July.

Proviso in a settlement that the wife should not be barred of any thing the husband should give or leave by deed or will; he dies intestate, and a freeman of London, her shares by the statute and custom are not a satisfaction of the covenant. (1)

[*96]

THE bill set forth, that, by settlement previous to the marriage between plaintiff's late father and defendant, then *Maria Marsh*, dated 20th June 1766, in consideration of the said intended marriage, and of the defendant's marriage-portion of 5000*l.* which was paid to defendant's late husband's father, he assigned all his share in a partnership to defendant's late husband, and covenanted, that he would at his death, by will or by deed, give or leave 5000*l.* to be paid by his executors and administrators, within three months next after his decease to the defendant's late husband, to the use of defendant's late husband, and his child or children by defendant, in such shares and proportions as he the father should, by such will or deed, appoint: but, if there should be no such child, the same, after the decease of defendant's late husband, was to revert to the executors or administrators of his said father; and, in default of such will or deed, the executors or administrators of said *John Kirkman*, the elder, should pay the said 5000*l.* to *John Kirkman* the younger, his executors, &c. And further covenanted, that, in case the said intended marriage should take effect, and the defendant [*] should survive; the said *John Kirkman* the younger, or his surviving partner or partners in trade, should pay unto the trustees, but to and for the use and benefit of the defendant, 10,000*l.* with lawful interest, in the following portions, viz. one-third part within six months after the decease of the said *John Kirkman* the younger; one other third, together with interest, to be computed from the end of six months after the decease of the said *John Kirkman* the younger, within twelve months after the death of said *John Kirkman* the younger; and the remaining third part in full of said 10,000*l.* together with interest for the same, as aforesaid, within eighteen months next after the decease of said *John Kirkman* the younger. And it was provided and agreed between the parties, that, in case the defendant should survive the said *John Kirkman*, and should be desirous to continue the said 10,000*l.* in the joint trade which should be then subsisting between said *John Kirkman* the younger, and his partners, to the end of the term then to come in such copartnership, that then she should have full liberty so to do; and the surviving partners, or the heirs, executors, or administrators of said *John Kirkman* the younger, should, within three months next after his death, enter into a bond, in a sufficient penalty, to pay to said defendant said sum of 10,000*l.* at the determination of said copartnership, together with interest for the same, after the rate of 6 *per cent. per annum*, to be paid half-yearly, and to commence from the end of six months next after the decease of said *John Kirkman* the younger. And it was thereby agreed between all the parties, that in case there should be one or more child or children of the body of the said *Maria Marsh* by said *John Kirkman* begotten, who should be living at the time of such payment of said 10,000*l.* and interest as aforesaid, and who should survive said defendant, and live to attain twenty-one, or day of marriage,

(1) Vide *Haynes v. Mico*, *antea*, 1 vol. 129. with 10 Ves. 14. and the references; and see the material cases on the subjects of Satisfaction, Performance, &c., judiciously classed by Mr. *Swanston*, in his note to *Goldsmid v. Goldsmid*, 1 vol. *Swanst. Rep.* 221, 222. See particularly Lord *Eldon*'s elaborate judgment in *Garthshore v. Chalie*, 10 Ves. 7. &c. &c. in which there are some observations upon part of what Lord *Thurlow* is reported to have said in the principal cases. See 10 Ves. 14.

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against
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(if daughters) that 5000*l.* part of said 10,000*l.* should revert upon the death of said *Maria Marsh*, and be paid and divided between such child or children, (if more than one) in such shares and proportions as said defendant should, by deed or will, whether covert or sole, under her hand and seal duly executed, and attested, by, and in, the presence of two or more witnesses, direct, limit, and appoint; and, in default of such deed, will, or appointment, among such children equally, (if more than one,) and if only one, then to such only one; the shares to be paid [*] to sons at twenty-one, and to daughters at twenty-one, or day of marriage, which shall first happen, after the decease of said *Maria Marsh*. And further, that, in such case, for better assuring the payment and distribution of said 5000*l.* in manner aforesaid, in case there be any such child or children, the said *Maria Marsh* should give security, at the payment of the said second part or portion of said 10,000*l.* and interest above mentioned, to the satisfaction of the trustees, for the faithful payment and distribution of said 5000*l.* after her death, among her said children, or to such her said child, in case there should be only one such who should survive her, and who should live to attain twenty-one, if a son, or twenty-one or day of marriage, if a daughter; and, in default of her giving such security, that then it should be lawful for the trustees, or the survivor, to receive and retain so much of said second payment of said 10,000*l.* as, with the third payment thereof, would make up said 5000*l.* which they should immediately invest in government funds, stocks, or other public securities, with the approbation, and by the direction of said *Maria Marsh* (if then living) in trust, to the like uses: but in case such children should die during their minority, or unmarried, (if daughters,) then in trust to transfer and pay said 5000*l.* unto such uses as said *Maria Marsh* should, by deed or will, attested as aforesaid, appoint, and, in default of such appointment, unto her executors or administrators; and then followed a proviso to the effect following: "Provided always, that *nothing herein before contained, or the provision hereby before made, or intended to be made and secured, to and for the use and benefit of the said Maria Marsh, out of the personal estate of the said John Kirkman the younger, her intended husband, in case the said intended marriage should take effect, and she shall happen to survive the said John Kirkman the younger, shall be in anywise construed, deemed, taken, or understood to bar or deprive her of her right to dower or thirds by the common law, or any of the laws or statutes of this realm, or by any law, custom, or usage whatsoever, of, into, and out of all such real estate, as the said John Kirkman the younger, her said intended husband, or any other person or persons, in trust for his use, shall become or stand seized or possessed of in his life-time, nor to bar or deprive her of having, taking, receiving, holding, keeping, or enjoying any other gift, provision, or bequest, which he shall think fit to give, bequeath, leave, or make, to or for her the said Maria Marsh, his [*] said intended wife, in and by his last will and testament, or in or by any other deed or gift in his life-time, or otherwise in anywise whatsoever, any matter or thing herein-before mentioned, expressed or contained, or which in anywise may be understood, deemed, construed, taken, or interpreted to the contrary, in anywise notwithstanding.*" The bill further stated, that the marriage took place, and that the defendant's late husband *John Kirkman*, who was not then a freeman of *London*, soon afterwards became so. That on 15th September 1780, he died intestate, leaving his said wife and five children, (that is to say) the plaintiffs, and *Samuel Kirkman*, since deceased, him surviving. That the defendant obtained letters of administration of his goods, &c. and possessed herself of his personal estate, to the amount of many thousand pounds, paid his debts, &c. and retained to herself the 10,000*l.*

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10,000*l.* so covenanted to be paid to her by the settlement. The plaintiffs then insist, that, upon the death of their father intestate, and a freeman of *London*, as aforesaid, the residue of his estate, after payment of the aforesaid 10,000*l.* and his debts and funeral expences became distributable, (in case the settlement is not a bar to defendant's claiming any part of the personal estate,) according to the custom of the city, in the following manner: one moiety thereof to his five children, the plaintiffs, and their said late brother *Samuel*, deceased; and the other moiety became distributable, according to the statute of distribution, viz. one-third of such last mentioned half part to the said defendant, and the other two-third parts thereof became divisible amongst plaintiffs, and their late brother *Samuel Kirkman*, deceased; and, in case the said settlement is (as they submit it is) a bar also to her claiming any part of the said personal estate, (except as to the said 10,000*l.*) either under the said custom or statute, or otherwise, then plaintiffs submit, that both the moieties became divisible between them and their deceased brother only; and, in case the settlement is not a bar to her claiming any part of the intestate's personal estate under the custom, or under the statute, plaintiffs submit, that the shares she shall take, either under the custom or under the statute, or, at least, such share as she shall be entitled to under the statute, ought to be considered as a satisfaction of the 10,000*l.* or, at least of the 5000*l.* part thereof, which she takes for her own use, they submit also, that she ought to bring 10,000*l.* or, at least, the 5000*l.* into hotchpot. They then state, that their [*] brother died on or about 29th September 1780, aged three years only, and that the defendant obtained administration of his goods, and claim different shares, (according to the effect of the proviso) in his share of their father's personal estate, and that they are also entitled to have 5000*l.* part of said 10,000*l.* secured in the manner in the said indenture mentioned, for their benefit, or the benefit of such of them as shall survive the said *Maria Kirkman*, and attain the age of twenty-one years, or days of marriage, being daughters. — The defendant, *Maria Kirkman*, by her answer, claims to be entitled, over and besides the 10,000*l.* by the custom of the city of *London*, as the widow of a freeman intestate, to her paraphernalia, and furniture of her bed-chamber, and to one-third part of the clear residue of his personal estate and effects, and that plaintiffs, and their said late brother *Samuel Kirkman*, deceased, are only entitled to one other third part, and that the other third part is to be subject to the statute of distribution, and is to be divided accordingly; and that she, as the widow, is entitled to an equal share with plaintiffs in the distributive part or share, and insists that she is not barred from these claims by the settlement, in as much, as, by the proviso she was not to be barred from right of dower, &c. (as in the proviso); and although her late husband did not make any further provision for her by deed, &c. that his taking up his freedom of the city of *London* after his marriage, and dying intestate, ought to be considered as a further provision, by giving her title to her customary share in his personal estate, and, for the same reason, claims her distributive share of her husband's estate under the statute; and submits, that the shares she shall so take, under the custom or under the statute, ought not to be deemed a satisfaction for either of the said sums of 10,000*l.* or 5000*l.*, nor ought she to bring the sum of 10,000*l.* into hotchpot, the rule for bringing into hotchpot only extending as between brothers and sisters, where some are advanced during the father's life, and others not so. She also claimed to be equally entitled with her sons and daughters by the statute of distribution, in the share of her deceased son, out of the personal estate of her late husband.

Mr. Attorney General, and Mr. Mansfield, for the plaintiffs contended — that what Mrs. *Kirkman* took by the intestacy of her [*] husband as

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a freeman of *London*, would be a satisfaction *pro tanto* for the 10,000*l.* if it were not equal to it in value, which it was said, in this case, to be, that it had been determined in the cases of *Blandy v. Widmore*, 1 Wms. 324. and *Lee v. D'Aranda*, 3 Atk. 419. 1 Vesey, 1. S. C. (2) that where there was a covenant to leave a specific sum, an equal share, coming under the statute of distribution, was a satisfaction of the covenant. Therefore, being administratrix, and, as such, taking her distributive share, the covenant here is satisfied. This would be clear if the proviso was out of the case. — The proviso is a strange one. It is to prevent any further provision, which he might make for her, from being a satisfaction; but it is restrained to will or deed, and omits to provide for intestacy. It must therefore, on the intestacy, be a satisfaction.

Mr. *Scott*, for the defendant. — The cases of *Blandy v. Widmore* and *Lee v. Cox* and *D'Aranda*, have been distinguished from cases of satisfaction; they have been called cases of performance. *Barret v. Beckford*, 1 Vesey, 520. The sum here is uncertain; it may not be a complete satisfaction; besides, there is a material difference between this proviso and other parts of the deed; in the other parts, the provision is by deed or will; in this, by deed, will, or any other means whatsoever.

Lord Chancellor. — Before the cases of *Blandy v. Widmore*, and *Lee v. D'Aranda* (3), it may be doubtful, whether suffering a part to come by the statute, was a sufficient performance; I should have thought the word *leave*, in these cases, should be taken in an active sense; but they have settled the point. At the same time I think, neither of those cases can apply where the whole is not satisfied. (4) It was the intention of the proviso, here, that the covenant should not bar her from any effect of the husband's success. As to the 5000*l.* she is entitled by the settlement to the use of it, therefore she must give security, otherwise I would have invested it.

(2) See the Supplement to Vesey senior, p. 1, &c.

(3) Lord Eldon C. observed, in *Garthshore v. Chalie*, 10 Ves. 14. that *Blandy v. Widmore*, and *Lee v. D'Aranda*, have remained unimpeached; and that it was not the intention to shake them in *Haynes v. Mico*, (*antea*, 1 vol. 129.) and *Devise v. Powlet*, 1 Cox, 188.

(4) Lord Eldon C. says, in 10 Ves. 14. "I believe it is accurately stated, upon Lord Thurlow's authority (notwithstanding what His Lordship is represented to have said "in *Kirkman v. Kirkman*) that if in *Blandy v. Widmore*, and *Lee v. D'Aranda*, what "was taken in the second instance was properly held a performance, because it was more; "it must, if it had been less, have been taken to be a part performance."

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[Affirmed on
re-hearing,
postea, 152.]
*Lincoln's Inn
Hall*, 18 July.

A. purchased
an estate sub-
ject to a mort-
gage, the per-
sonal estate
shall not exonerate the real for payment of the mortgage debt. (2)

[*] TWEDDELL against TWEDDELL.

(1)

THIS bill was filed by *Francis Tweddell*, devisee for life of an estate called *High Laws*; under the will of *John Aynesley* his grandfather, and

(1) No entry on this occasion: but the Lord C. afterwards affirmed the present order allowing the demurrer. Vide *postea*, 152. and Reg. Lib. 1786. B. fol. 334.)

(2) *S. P. Butler v. Butler*, 5 Ves. 554. 538. and vide in *Lawson v. Lawson*, *antea*, 1 vol. 58. and the references to *Tankerville v. Fawcet*, *antea*, 57. and the notes. See also on the principal case, more especially 3 Ves. 130, 131. 5 Ves. 538. and 14 Ves. 423. where Sir W. Grant, M. R. said, "it was much a subject of doubt subsequently to the "decision." Sir P. Arden (in *Woods v. Huntingford*, 3 Ves. 130, 131.) "states the "whole

and *John Tweddell* eldest son of *Francis*, against the personal representatives and next of kin of *John Aynesley*, praying, amongst other things, to have the personal estate of *John Aynesley* aforesaid, applied in discharge of a mortgage subsisting upon the *High Laws* estate.— And the case made by the bill was as follows:—

That by indentures of lease and release, by way of mortgage, dated the 9th and 10th of *February* 1737, the release being made between *John Aynesley* of the first part, *William Aynesley* of the second part, and *Edward Delaval* of the third part, in consideration of 1776*l.* therein mentioned, to be paid to *John Aynesley*, for the proper debt of *William Aynesley*, and 224*l.* therein mentioned, to be paid to *William Aynesley* by the said *Edward Delaval*, making together 2000*l.* the said *John Aynesley*, with the approbation of *William Aynesley*, bargained and sold the estate called *High Laws*, &c. to hold to the said *Edward Delaval* in fee, subject to a proviso for redemption, on payment of 2000*l.* and interest.

That *John Aynesley* afterwards agreed to purchase the estate of *William Aynesley*, and thereupon, by indentures of lease and release, of the 29th and 30th of *April* 1747, made between *William Aynesley* of the one part, and *John Aynesley* of the other part, reciting the mortgage of *Delaval*, and also reciting, that the said *John Aynesley*, by articles of agreement entered into between him and the said *William Aynesley*, had contracted with the said *William Aynesley* for the absolute purchase of the inheritance of the said premises, and had agreed to pay the sum of 3500*l.* for the same, in manner therein mentioned; (that is to say) to *Francis Blake Delaval* (son and heir at law of *Edward Delaval*) all such sums of money as should be due to him, for principal and interest, upon the said mortgage, on the first of *May* then next; as also to pay, or secure to be paid, to the said *William Aynesley*, all such sums of money as should remain of the said 3500*l.* after [*] deducting the money due to *Delaval*; and also reciting, that, upon the first of *May* then next, there would be due from the said estate, to the said *Francis Blake Delaval*, the sum of 2155*l.* subject and liable to the payment whereof the said *John Aynesley* was to take the said premises, and which sum being deducted from the 3500*l.* there would remain in the hands of *John Aynesley* 1345*l.* to be paid by the said *John Aynesley* to the said *William Aynesley*, on the conveyance being made. It was witnessed, that the said *William Aynesley*, in consideration of the performance of the said articles on his part, and of the said sum of 1345*l.* to him paid, or secured to be paid, by the said *John Aynesley*, did grant, &c. to the said *John Aynesley*, his heirs and assigns for ever, all the said premises, &c. and the common covenants were therein contained, and, in the covenant against incumbrances, the mortgage and securities made to the said *Edward Delaval* for the 2000*l.* and interest, were excepted; and the said *John Aynesley* did thereby, for himself, his heirs, executors, and administrators, covenant and agree with the said *William Aynesley*, his heirs, executors, and administrators, that he the said *John Aynesley*, his heirs, executors, and administrators, should well and truly pay, or cause to be paid, to the said *Francis Blake Delaval*, his heirs, executors, administrators, and assigns, the said sum of 2155*l.* in manner aforesaid, and would at all times thereafter indemnify the said *William Aynesley*, his

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“ whole import and effect of the principal case to amount only to this, That where a man buys subject to a mortgage, and has no connection, or contract, or communion with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself, as between his heir and executor, but merely that which he must do, if he pays a less price in consequence of that mortgage, (that is, indemnifies the vendor against it,) he does not by that act take the debt upon himself personally.”

heirs,

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heirs, executors, and administrators, and his and their goods and chattels, lands, and tenements, from all costs and charges, &c. in respect of the said mortgage to *Edward Delaval*.

That *John Aynesley*, by his will, dated 5th *January* 1748, devised the said premises, (together with the other real estates,) but subject nevertheless to the payment of all his just debts and legacies, to *John Reid*, his heirs and assigns, for ever, to the use of his first son *John Aynesley* for life, and, after the determination of that estate, to trustees to preserve contingent remainders, but subject nevertheless, *after payment of his just debts and legacies*, but not sooner, to permit and suffer the said *John Aynesley* to receive the rents and profits during his life, and, after his death, to the first and other sons of *John Aynesley* the son, in tail-male; remainder to the issue-female of *John Aynesley* the son, as tenants in common; remainder to the testator's two daughters, *Mary* and *Anne*, during their lives, as tenants in common; [*] remainder to plaintiff *Francis Tweddell* (son of testator's daughter *Mary*) for life; remainder to trustees to preserve, &c.; remainder to the first and other sons of *Francis Tweddell* in tail-male, with other remainders over; and, after giving some legacies, the testator did thereby charge and make liable the rents and profits of all his real estates, to the payment of *all his just debts and legacies*; and, after reciting that his estate at *High Laws* was then in mortgage to *Francis Blake Delaval* for 2000*l.* he the said testator did thereby direct and give full power and authority to his trustee *John Reid*, his heirs and assigns, to take and receive the rents and profits of all his said real estates, as well for the payment to the said *Francis Blake Delaval* of the debt of 2000*l.* and the interest thereof, as all his the said testator's other just debts and legacies, and outgoings, in such order and manner as his said trustee should think proper. But the testator made no disposition of the residue of his personal estate.

As to so much of the said bill, as prayed that any part of the personal estate of *John Aynesley*, the testator, might be applied in payment of the mortgage for 2000*l.* and interest upon the estate at *High Laws*, the defendant *John Tweddell* demurred (3); for that the said plaintiffs have not shewn any title to have such personal estate so applied.

This demurrer was argued the 31st *July* 1784, when the Lord Chancellor thought it ought to be over-ruled; but, upon application of defendant's counsel, it was set down to be re-argued; and it was re-argued the 17th and 20th *December* 1784; and two questions were made, first, whether from the nature of the contract, the personal estate of *John Aynesley* was liable to be applied in discharge of the mortgage.

Secondly. If it were not so, from the nature of the contract, whether *John Aynesley* had made it liable to be so applied by his will.

Mr. Attorney General, Mr. Scott, and Mr. Mitford (for the demurrer). — The principle upon which personal estate is applied by this Court, in the first instance, in cases where the real estate is also liable, is, not upon the ground of the personal estate having received a benefit; but because the contract is in its nature primarily personal; and, therefore, the Court says the personal [*] estate shall be primarily liable. The creditor, to be sure, may resort to either fund; but the Court will not permit his election to vary the right of the parties, and, therefore, interferes in directing the application of the proper fund; therefore in the proper case of a mortgage, the single act of borrowing, which creates a personal debt, renders the personal estate liable, in the first instance, to repay it: to which the pledge of the land is added, as a further security to the creditor, and this does not arise from the force of the covenants

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(3) " In Mitford's Treatise, p. 191., it is stated, that the defence was first made by plea, which was over-ruled as being proper for demurrer." Mr. Cox's note.

usually

usually inserted in mortgages, for where a mortgage is made without a covenant for repayment of the money, yet, the personal estate of the mortgagor shall be first applied; so laid down in *Cope v. Cope*, 2 Salk. 449. On the other hand, it is the constant rule of the Court, that an heir, or a devisee of a mortgaged estate, cannot call for the aid of the personal estate of the ancestor or testator under whom he claims, unless such charge on the real estate was, either in its creation, or by some act of such ancestor or testator made a charge in the first instance, on the personalty. And, therefore, where the real estate is, from the nature of the contract primarily liable, it shall be first applied; and though covenants are added, yet, if they are meant as collateral securities to the land, they shall not have the effect of altering the fund. This is the principle of *Bagot v. Oughton*, 1 Wms. 347. so *Evelyn v. Evelyn*, 2 Wms. 659. *Howel v. Price*, 1 Wms. 291. *Leman v. Newnham*, 1 Vesey, 51. There are also several cases which shew that, where the covenantor is the original debtor, yet, if he appears to intend the real estate to bear the burden, it shall bear it in exoneration of the personal. *Coventry v. Coventry*, 9 Mod. 20. *Freeman v. Edwards*, 2 Wms. 435. *Lacam v. Martins*, 1 Vesey, 312. *Robinson v. Gee*, 1 Vesey, 251. *Lawson v. Lawson* in the House of Lords, 27th February, 1781.† Then as to the present case, the whole of it is, that *John Aynesley* purchased an equity of redemption from *William*. He had not borrowed the money, or made any personal contract with the mortgagee: but he merely intended to buy *William's* interest in the estate, *ultra* the mortgage. For *William's* security, it was necessary to covenant with *him* for the payment of the mortgage; because *William's* personal estate remained liable, in respect of his original covenant with the mortgagee. And, with that view only, were the covenants inserted, that *John* should pay the money, and indemnify [*] *William*. There was no covenant with the mortgagee from *John*, nor any which the mortgagee could take advantage of, against him personally.

And if the mortgagee could have been induced to have executed a release of his personal remedy against *William*, there would have been an end of the covenant between *William* and *John*. The case of *Belvidere v. Lord Rochford*, in 6 Bro. P. C. 520. is what is principally relied on on the other side: but there were so many circumstances, that were relied upon, in the reasons given in the printed cases, (which is the only way of judging of the grounds of that decision,) upon which that case might have been decided, independent of the present question, that it cannot be considered as an authority, further than to prove that the intention of the debtor will govern it. One reason, in particular, for applying the personal estate was, that otherwise the mortgaged estate, which the testator meant as a provision for a brother, would have been worth nothing. As to the *first* point, therefore, in the present case, there is nothing in the nature of the contract which will make *John Aynesley's* personal estate primarily liable.

Secondly. There is nothing in the will, which makes the personalty liable to what it was not before, in respect of this mortgage. Express words, or necessary implication, is equally required, in order to charge the personal estate, in the first instance, where, from the nature of the contract, the real estate is primarily liable, as it is to charge the real estate, in the first instance, where the personal estate is, from the nature of the contract, primarily liable. Now, if this had been the latter case, instead of the former, would any body have contended that there was sufficient in this will to have exonerated the personal estate? It is said, that the part of the will which directs the rents and profits of the real

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estate to be applied in payment of this, as well as all the other debts, shews the testator meant to treat this as a debt, to all intents and purposes; and that it, therefore, must be paid in the same manner, and out of the same fund, as all his other debts. But, supposing the first part of the argument to be well established, namely, that, from the nature of the contract, the real estate is primarily liable, it will be going a great way to consider these words in the will, as an adoption of this as [*] a debt, to the extent of charging the fund out of which it was not, in the first instance, to come. The cases of *Pockley v. Pockley*, 1 Vern. 36. and *Belvidere v. Lord Rockford*, were determined on the ground, that the testator had manifested an intention that his personal estate should discharge the incumbrance.

Mr. Madocks and Mr. Lloyd (for the plaintiffs). — The plain case is, that *John Aynesley* agreed with *William* for the purchase of an estate for 3500*l.* This is the very recital of the indenture of 1747, "that *John Aynesley* had contracted with *William* for the absolute purchase of the inheritance of the said premises, and had agreed to pay 3500*l.* for the same." It was a plain intention in him to convert 3500*l.* of his personal estate into real; which is the ground upon which the court proceeds, where a man dies before he has completed a purchase, in directing an executor to pay the money, and the conveyance to be made to the heir. Here the purchaser found it convenient to leave 2000*l.* part of the purchase-money unpaid, which was secured by a mortgage on the premises; and is the same thing as if he had raised 2000*l.* part of the purchase-money, by a mortgage of another estate; in which case it would evidently be his debt: and it will make no difference whether the whole purchase-money is to go into the pocket of the vendor, or whether part of it is to be paid in discharge of an incumbrance. The case of *Cope v. Cope* is in point to this. Then, with respect to the covenant, it is to pay the money due for principal and interest to *Delaval* on the 1st of *May* then next; therefore, the next day, an action would lie on the covenant against *John*, and, after his death, lies against his representative. In this way, therefore, it is a personal debt of *John*; and it is perfectly clear, from the words of this will, that he so considered it. The intention is full as clear as in *Pockley v. Pockley*, which was decided on that ground.

The Lord Chancellor directed this cause to stand for judgment the 2d day of *Hilary* Term; but, his Lordship's illness intervening, he did not give judgment till this day.

Lord Chancellor. — This comes before me upon a demurrer, and the question is, whether the personal estate shall be applied for the benefit of the heir, in discharge of a mortgage-debt upon real estate. It arises upon the following case (stating the case). The point is, whether the personal estate shall be exempted or [*] not from the payment of this charge. It is a clear rule, that the personal estate is never charged in equity, where it is not at law, and, if not chargeable at law, there is no principle, or case, in this court, to warrant its being chargeable in equity, contrary to the order of the law. (4) There is no case expressly decided, upon the subject upon which I am now to give my opinion. However, the grounds, upon which former cases have been decided, apply to the present; particularly that case, where a grandfather bought an estate charged with a mortgage, and it descended to the father; and the father, having occasion to borrow money, charged the estate with that sum, entering into a covenant, charging himself, at law, with the payment. This transaction, certainly, changes the nature of the debt, and makes it his own. This principle I think applicable to the present point. *Cope v.*

(4) See the observations of Sir P. Arden, M. R. on this case, in *Woods v. Huntingford*, 3 Ves. 130, 131. and the references in note (2) *antea*.

Cope,

2 Salk. 449. was the first case cited at the bar. There is another in 2 Wms. 659. *Evelyn v. Evelyn*. The principle is more expressly down in that case. The land was the original debtor, and the assignee could not bring his action against the executor, or any other, but merely against the original debtor. As to the case in 1 Chan. Cases, 74. nothing more is to be gathered from thence, than the general rule: *Cornish v. Mew*, Ch. Ca. 271. *Pockley v. Pockley*, 11 Ch. 36. shew, that where a purchaser of an equity of redemption the personal estate shall not be applied for the benefit of the heir, being the ancestor's debt.

where it is a debt payable by executors, at law, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims, 11 Ch. 347. 2 Wms. 664. 1 Vesey, 312. In respect of the rule of marshalling assets, it is, that it must be a debt affecting both the real and personal estate: so, in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove the executors are accountable at law, and not in equity. There is a case abridged in 11 Ch. 520. *Lord Rochford v. Belvidere* (5), (which Lordship stated). I cannot distinguish that case from this: the House of Lords were of a different opinion to what I entertain upon this case, therefore I have stated it more at length. The personal estate never was liable, and the party never was liable to an action upon covenant. In that case *George* had a fee-simple [*] in the estate; he was capable of bringing it after the charges were extinguished; however, it was held, contrary to my opinion, that the personal estate was liable. As to the present case, let the demurrer be allowed; as my opinion is, that the personal estate never was liable, either by action against the party himself, or against his executors. Demurrer allowed. (6)

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(5) 5 Bro. P. C. 299. octavo edition.

(6) This was afterwards affirmed on a rehearing. See *postea*, 152.

ASHBURNER against MACGUIRE.

(No entry.)

Lincoln's Inn
Hall, 18 July.

WILLIAM MACGUIRE, by his will, dated 27th September 1778, bequeathed (*inter alia*) as follows: *Item*, I bequeath to my sister Ashburner the interest arising from her husband William Ashburner's to me for principal 3500*l.* sterling, during her life, independent of present, or any future husband, amounting to 175*l.* sterling, per annum. *Item*, I bequeath the principal of the said bond, on the decease of my said sister Jane Ashburner, to her four daughters, Elizabeth, Anne, Mary, and Sophia, to be equally divided among them, or the survivors of them. *Item*, I bequeath to Mr. William Beawes, now at school with the friend Mr. Everett, at Felstead, in Essex, my capital stock of 1000*l.* in India Company's stock, with the dividend thereon arising, which dividend is to pay for his education and maintenance, till he is qualified to obey orders, and then the capital to be laid out in the purchase of a

Legacy of a debt is not deemed by the testator having received dividends on a bankruptcy. (1)

Legacy of my 1000*l.* East-India stock is specific, and deemed by the testator's having sold the stock. (2)

See 1 Roper on Legacies, 30, 31, &c. &c., especially *Coleman v. Coleman*, 2 Ves. jun. 30. *Stanley v. Potter*, 2 Cox, 180, &c.

See the references in the preceding note, and *Chaworth v. Beech*, 4 Ves. 555, &c., especially the observations on the principal case, *Ibid.* 565, 566, 567. See also *James v. Johnson*, 4 Ves. 568, &c., and *Gittins v. Steele*, 1 Swanston, 24.

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living for him in the church. This stock is to be continued or disposed of at the discretion of my executors.

William Ashburner the debtor became a bankrupt in *February* 1780. In *March* the testator proved this debt under the commission, and 16th *May* 1781 received a dividend thereon of 4s. 3d. in the pound.

The testator died 12th *July* 1781. Since his death another dividend of 2s. 9d. has been made to the bankrupt's creditors.

The testator, at the time of making his will, was possessed of 1000*l.* *East-India* stock, and no more; but sold out the whole [*] of it before his death. *Beawes*, the legatee of this stock, was a natural child of the testator.

The bill was brought by *Mrs. Ashburner*, her four daughters and *Beawes* to have the whole sum of 3500*l.* secured for *Mrs. Ashburner* and her daughters, and to have such part of it as is due out of the estate of *Ashburner*, the bankrupt, paid by his assignee, and the residue paid by the personal estate of the testator out of his general effects; and that the personal representative of the testator might also purchase, with the testator's personal estate, 1000*l.* *East-India* stock, and transfer the same for the use of the plaintiff *Beawes*, as directed by the will. The defendants, the administratrix, and residuary legatees, insisted that the plaintiffs the *Ashburners* were intitled only to what remained due to the testator at the time of his death out of the estate of the bankrupt; and that the legacy of *East-India* stock to *Beawes* was adeemed, by testator's disposing of it in his life-time.

The cause was heard before the Lord Chancellor in 1784, and on 18th *July* 1786, he gave judgment.

After stating the case, he said the claim of *Mrs. Ashburner* and her daughters depended on two questions,

1. Whether the bond was given as a specific legacy; which depends on this, whether the manner in which the sum is mentioned turns it to a pecuniary legacy, or, as the civilians call it, a demonstrative legacy; that is, a legacy in its nature a general legacy, but where a particular fund is pointed out to satisfy it; or whether it be what they call a *legatum nominis*, or *legatum debiti*.

The 2d question is, whether the legacy, supposing it to be specific, is adeemed, so far as the testator has received dividends in respect of the debt (or, as the bankrupt's estate may be insufficient to pay the residue). I will take the 2d point first; for this is clearly a specific legacy, according to all the definitions. Wherever a debt, or a part of a debt, is the subject bequeathed, it is *legatum nominis*, or *legatum debiti*. (3) I shall not stand long upon that point.

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[*] With respect to the 2d point, as to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognized by Lord *Talbot* and Lord *Hardwicke*. It is, that where a debt is bequeathed, and is afterwards extinguished by the act, or concurrence, of the testator, as, by demand or suit, the legacy is adeemed; but, if paid in without suit or demand, there is no intention to (4) adeem; and there are innumerable authorities, that a legacy of a debt is not adeemed by a voluntary payment. Lord *Camden*, in the *Attorney General v. Parkyn* (5), expressly exploded this distinction; so did Lord *Macclesfield*. I am inclined to adopt their opinions (4); because I can

(3) See accordingly per Lord *Hardwicke* C. in *Heath v. Perry*, 3 Atk. 108.

(4) See 1 *Roper* on Legacies, 30, 31. where it is stated on reference to the later authorities, that such distinction *per se*, is exploded, and that although the fact of a compulsory payment amounts to strong *prima facie* evidence of an intention to adeem, yet where any reason can be given for the receipt of the money, no ademption will be presumed.

(5) *Ambler*, 566.

find no ground for the distinction, but a passage in Swinb. sect. 20. p. 7. (p. 548. 6 ed.). But I doubt if the authors cited by him support him. *Godolphin*, (Orphan's Leg. 4 ed. 434.) referring to the same books, states the rule differently; and so have other writers. By the civil law, it was competent for a man, after he had changed the subject-matter of a specific legacy, to declare, by his conduct, that such a change was no ademption. The case put is of a gold chain, which the testator, after having bequeathed it by his will, converts into a cup; the legacy is not adeemed, because the cup might be restored to its former shape.

This has not been adopted by our law. There is no ground to say, that, after a legacy is extinguished, a man, by his conduct, may revive it. It is contrary to common sense; as appears by the instance put. The gold chain may have been given as a legacy, because it had been long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased.

There is an exception or limitation to this rule, where the testator alters the form, so as to alter the specification of the subject; as by making wool into cloth, or a piece of cloth into a garment: there the legacy is adeemed, because the subject-matter cannot be restored to its former state.

This distinction is intelligible, in an action where the thing sued for cannot be recovered in specie; but it is not intelligible, when applied to a legacy. And what is more material, never was adopted by our law. As to legacies of debts, according to the civil law where the testator had sued for, but had not recovered, or had got judgment, but not execution, or had actually [*] recovered the debt, but had set the money apart for the legatee, or, by words, declared he did not intend to revoke the legacy; in none of these cases was the legacy adeemed. But there is no authority in the civil law, for the distinction between a debt being paid without demand, and in consequence of a demand; besides, although it can be ascertained where a suit was commenced for a debt, it may be extremely difficult to ascertain whether any demand has been made; if the testator receive payment of the debt, the legacy is gone, unless it appear, from the manner of his disposing of the money afterwards, that he means to preserve it for the legatee. (6) Lord *Camden*, in the *Attorney General v. Parkyn*, [Ambler, 566.] held there was no distinction between voluntary payment, and payment on a demand, and that, in both cases, the legacy was extinguished; he added that where the sum is specified in the bequest, it is a general legacy, as I shall mention on the other point. But the distinction between, I bequeath the 500*l.* due on a bond from *A. B.* and I bequeath the bond from *A. B.* is very slender; and so admitted to be by his Lordship. In the civil law, there is a distinction taken between a demonstrative legacy, where the testator gives a general legacy, but points out the fund to satisfy it, and a taxative legacy, where he bequeaths a particular thing.

On the first point, I am clear this is a specific legacy. If the fortune of the testator had failed, so as not to satisfy all the pecuniary legacies; and the question had been whether this legacy should have been contributive to the pecuniary legacies, I believe no man in the profession would have doubted. (7)

When the testator made his will, 3500*l.* was due to him from *William Ashburner*, by bond; he meant to relinquish that bond for the benefit of the family; not by way of release to the husband, but by way of settlement: and that this debt, whether it turned out well or ill, should go to the family; the interest to his sister for her life, the principal

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(6) *Vide* 1 *Roper* on Legacies, 35, 36, and the preceding references.

(7) *See* *Gittins v. Steele*, 1 *Swanston's Rep.* 24.

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among her daughters. In this case, the bequest must be considered as specific, although the sum be mentioned (8): *for I cannot agree to Lord Camden's distinction.* (9)

As to the legacy of *East-India* stock to the plaintiff *Beawes*, there is no case to countenance his claim. The testator says, [*] I give *my capital stock to*, &c. the pronoun *my* has been relied on, in many cases, in deciding the legacy to be specific.

The testator, after making this will, sold his stock, which made it as if it had never existed; the legacy is adeemed, according to all the cases.

In questions upon legacies of debts, the cases have crept beyond the original principle, which was the distinction between demonstrative and taxative legacies, and recourse had been had to the *animus adimendi* which has nothing in common with the other principle.

In *Petteward v. Petteward*, Finch. 152., the court was of opinion, from all the circumstances, that the testator intended to give a legacy of 2000*l.* although the debts, pointed out for the payment of it, amounted only to 1700*l.*, and therefore decreed the deficiency to be made good out of the general assets. In *Pawlet's* case, Raym. 385. the legacy was held to be a pure legacy, or a legacy in *numeratis*, and not *legatum nominis*; and although the debt was paid to the testator, the legacy was decreed. In *Lord Castleton v. Lord Fanshaw*, 1 Eq. Abr. 298. a legacy of a debt was held to be specific, although the sum was named.

In *Orme v. Smith*, 1 Eq. Abr. 302., Gilb. 82., and Vern. 681., the payment was voluntary, and, from thence, was inferred an argument, that there was no *animus adimendi*. (10)

In *Lord Thomond v. Earl of Suffolk*, 1 Wms. 461. Lord *Macclesfield* disapproved of the distinction between a debt recovered by suit, or paid in voluntarily. A definition of a specific legacy is given by Lord *Macclesfield* in *Hinton v. Pinke*, 1 P. Wms. 539. and the advantages and disadvantages as between a specific and pecuniary legacy, are mentioned; and, among other instances, that the legatee of a debt, which is lost by the insolvency of the debtor, shall have no contribution from the other legatees.

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In *Crocket v. Crocket*, 2 P. Wms. 164. the testator bequeathed the sum of 550*l.* which was then in Mr. *Ellis's* hands; the testator, before making his will had placed that sum in the hands [*] of Mr. *Ellis*, and had got his note for it. He had also, before making his will, drawn several bills on *Ellis*, which had reduced the sum to 430*l.* It was held, by the Master of the Rolls, that, as the drafts were all made before the will, and as the note for the full sum was still standing out, the testator should be considered as renouncing the payments, and that he meant to give the whole 550*l.* as a legacy. I take it to be clear, if a testator gives a cup which is in pawn, it is a full gift, and the executor must redeem. In *Ford v. Fleming*, 2 P. Wms. 469. and 1 Eq. Abr. 302. Lord *King* held, that calling in the debt was no ademption, supposing himself bound by the passage in *Swinburne* and *Pawlet's* case. How he could be bound by those cases I cannot conceive. This case determines nothing. *Lawson v. Stitch*, 1 Atk. 507. was also cited: the question arose on a deficiency. The case at the *Rolls*, cited 1 Atk. 508., is nonsense, and has often been denied. The question upon the legacy of the stock has been determined

(8) See *Heath v. Perry*, 3 Atk. 103.

(9) Lord *Thurlow* explains his dissent from the report of Lord *Camden's* considering the legacies in the *Attorney General v. Parkyn*, specific to one purpose, and general as to another, very fully in *Stanley v. Potter*, 2 Cox, 182. See, however, per M. R., 4 Ves. 566. and per Lord C. 2 Ves. jun. 640.

(10) See 1 *Roper* on Legacies, 35, 36, &c. and the references in the preceding notes. — uniformly —

uniformly. *Ashton v. Ashton*, C. T. Talbot, 152. and 3 P. Wms. 384. *Partridge v. Partridge*, C. T. T. 226. *Purse v. Snapling*, 1 Atk. 414. does not tell at all to the purpose. *Avelyn v. Ward*, 1 Ves. 420. is contrary to many cases determined before, and to one by Lord Hardwicke himself, viz. *Purse v. Snapling*.

Lord Camden, in the *Attorney General v. Parkyn*, [Ambler, 566.] decided one point, and left the other open.

Parkyn, in his will, recites that he had certain mortgages, to the amount of £. and bonds to the amount of £. He gives all these, by such enumeration, to *Pembroke College, Cambridge*. To his sisters, who were next of kin, he gave annuities, and declared they should have nothing more under his will. Several sums were afterwards called in, or paid before testator's death.

Lord Camden determined, that the sisters were not disappointed by the declaration that they should have nothing but the annuities: he held the legacy to the college was not adeemed as to the sums paid in; upon the ground that the sum was named, which he at the same time admitted to be slight. (11)

[*] The testator certainly meant to give every thing to the college except the annuities: but the bequest is in the strictest form of a specific legacy. — In *Cartwright v. Cartwright*, 18th July 1775, before Lord Bathurst. The bequest was, "I give 1400*l.* for which I have sold my estate this day, &c." The testator afterwards received the whole money, paid it to his banker, and drew out of his hands 1100*l.* of that money. Lord Bathurst held this to be a legacy of quantity, and that the receiving was no ademption, on the authority of the *Attorney General v. Parkyn*: but it is questionable whether that case supports that determination.

In the case before me, the testator plainly intended that his sister, *Sarah Ashburner*, and her children, should have the debt, owing to him by her husband, secured as a provision for them.

My decree will be, that the bond be delivered up to the wife and children, that they may receive the dividend not received by the testator, and whatsoever may hereafter be payable out of the bankrupt's estate in respect of that debt.

The legacy to *Beawes* is gone, and the bill must be wholly dismissed as to that claim. (12)

(11) See *vide* note (9) *ante*, especially 2 Ves. jun. 640. 4 Ves. 566. and 2 Cox, 182.

(12) The M. R. says, (in *Chaworth v. Beech*, 4 Ves. 566,) that Lord Thurlow "determined this case on full consideration, and took two years before he gave judgment."

SADLER *against* HOBBS.

(Reg. Lib. 1785. A. fol. 536.)

Lincoln's Inn
Hall, 18 July.

ON the 13th September 1765, *William Sadler* made his will, and thereby, after directing that all his debts should be paid, he gave the Executors drawing a joint draught for property of their testator, and suffering it to remain in the hands of a tradesman, both held liable, although one of them had done other act in execution of the will. (1)

(1) *Westley v. Clarke*, (before Lord Northington, and lately reported 1 Eden, 357.) is mentioned with some disapprobation, (whether rightly determined as to its particular circumstances, 4 Ves. 609.) seems to have given occasion to relax the sound intelligible rule, which previously prevailed, viz. that where either executors or trustees

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the sum of 4000*l.* to his sister Mrs. *Harris*, payable at such periods as therein mentioned; and the residue of his personal estate he gave to *William Reeve* and *Samuel Davies*, his executors after named, in trust for the plaintiff, in such manner as he thereby directed, with the common clause, that his executors should not be liable for the acts of each other. The testator died in the course of the same month, and, at the time of his death, the house of *Trueman, Reeve*, and Company, were indebted to him in a sum of about 7000*l.* *William Reeve* was then in partnership with *Devonshire* at *Bristol*, and in a very considerable [*] business as merchants. On the 5th of *April* 1766, *Reeve* and *Davies*, as executors of *Sadler*, drew two bills of exchange for 5000*l.* and 2000*l.* on the house of *Trueman, Reeve*, and Company, payable to the house of *Devonshire* and *Reeve*, in the following form:

“ Ten days after date, pay to Messrs. *Devonshire* and *Reeve* five thousand pounds, value on account with the estate of *William Sadler*, Esq. deceased, per advice. *Wm. Reeve. S. Davies.*”

It appeared that the testator was, at his death, indebted to the house of *Devonshire* and *Reeve* in about 3000*l.* and that the house of *Devonshire* and *Reeve* were indebted to *Davies* on a running account; and, particularly, that they paid him a sum of 1000*l.* on the 11th of *April* 1766, on account. This being the situation of the several parties, *Trueman, Reeve* and Company paid the 7000*l.* to *Devonshire* and *Reeve*, who gave credit for it in their books to the estate of *William Sadler*. On 14th *July* 1766, *Devonshire* died, and on 28th *August* 1769, *Davies* died; and it appeared that *Davies* had never acted in the execution of *Sadler's* will, (although he had proved it,) except by drawing the two aforesaid bills of exchange upon *Trueman, Reeve* and Company, *Reeve* being the sole acting executor. In *November* 1773, *Reeve* became a bankrupt, the said sum of 7000*l.* having remained in his hands from 1766 to the time of the bankruptcy. In 1774, the plaintiff attained his age of twenty-one years, and soon afterwards Mr. and Mrs. *Harris* joined in an assignment of the legacy of 4000*l.* to the plaintiff; (no demand of it having ever been made, from the death of the testator) but *Harris* and his wife had, at five different times, received generally on account eight guineas from *Devonshire* and *Reeve*; and, there being no personal estate of the testator to answer the said legacy, except the residue of the said sum of 7000*l.* after deducting the demand which *Devonshire* and *Reeve* had on the testator's estate, the question was, whether *Davies*, having joined in drawing the two bills of exchange, became thereby answerable to a legatee in respect of that money, although he had never received any part thereof. On a bill being filed, by the plaintiff, for his legacy, it had been referred to the Master to take an account of the testator's personal estate; and that whatever appeared to have come to the hands of *Davies*, should be answered by his executors, [*] they admitting assets of *Davies*; when the Master charged the estate of *Davies* with one moiety of this 7000*l.* to which report the defendants excepted.

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The exceptions were argued on the 14th *May* 1784, and this day Lord Chancellor gave judgment.

Lord Chancellor (after stating the case). The question is, whether *Reeve* and *Davies* (or his representatives) shall be answerable for any part of the 7000*l.* which was, by virtue of the drafts, paid into the house

(and executors more especially) joined in any act, which as to them was unnecessary, and a loss happened, the parties thus unnecessarily concurring, should be held responsible, although none of the funds came into their hands. That rule seems now restored. See *Hovey v. Blackman*, 4 Ves. 596.; *Chambers v. Minchin*, 7 Ves. 186, &c.; *Brice v. Stokers*, 11 Ves. 319.; *Lord Shipbrook v. Hinchinbrook*, 11 Ves. 252, and 16 Ves. 477, &c. *Vide ibid.*, 479.; *Langford v. Gascoyne*, 11 Ves. 333.; *Joy v. Campbell*, 1 Scho. and Lefroy, 328. 341.; *Underwood v. Stevens*, 1 Merivale, 712.

shire and Reeve, and so paid in as a debt due from the estate of Mr Sadler. The Master has discovered that this debt amounted to more than 9000*l.* and consequently has, by his report, charged the estate with the sum of 4000*l.* beyond that sum. Exceptions have been taken in respect of this charge, and upon those exceptions the question arises.

It is to be clear, that where, by any act, or any agreement of the parties, money gets into the hands of his companion, whether a co-executor, they shall both be answerable.

In the case of a perfect stranger, if the trustee clothes that stranger with power of receiving the money, they shall both be answerable. The rule of the Court hath changed, in various instances, in cases of trustees, but in cases merely in regard to executors, it has continued the same. There is a case on the other side, but that I will mention no more. The first case which I recollect to have been cited, was that in *Hardress*, 314. *Gill v. the Attorney General*. The rule, as established in that case, and adhered to in subsequent ones, remains the same at law; and there is no authority in this Court to contradict it: if one executor takes the money but of his own authority, his companion shall not be charged; but if he puts the money into the hands of his companion, he shews he had it in his power to secure it; and his companion, for some reason, was permitted to obtain the money of the money.

There is a very material case in *Croke Car.* 312. (*Foster v. Bridgeman*, 35. It was determined after the most utmost deliberation by the Lord Keeper *Coventry*, assisted by several judges. There were several points besides in the case. It was determined by as able judges as ever presided, upon principles of law, and upon principles of discretion, that a trustee, joining in the receipt, should be charged with the fund; because he appeared to have a share in the fund.

The rule of law had remained so to this day, the wisdom of it might be discussed in subsequent cases, as *Heaton v. Marriot, Fellowes &c.* (1 Wms. 81.). It has been determined, that where two parties join in receipts or conveyances, and the one, only, receives the money, that party shall be solely liable, as the other joined purely for the sake of conformity. But, in the case of executors, the rule of law is different, and both have been deemed liable. (2) As to the authority of the executor, in *Chan.* 49. the executor was well warranted for the act, as he had the money in the hands of the banker, pursuant to the directions of the testator. In *Pre. Chan.* 173. the executors were held to be answerable. As to *Churchill v. Hobson*, 1 Wms. 241. Lord *Harcourt* gave his opinion upon a distinction between creditors and legatees. An executor shall have a right to charge an executor, and a legatee shall not. This is to me an odd distinction. [But it is a distinction founded upon the fact that the executors would be chargeable at law, and would not be so in equity; and in *Leigh v. Barry*, 3 Atk. 583, 584. the legatees, having made themselves chargeable at law were not relieved in equity.] In a later case, in 3 Atk. 584. *Leigh and Barry*, the rule was established, that trustees shall not be chargeable, but that executors shall be so in such circumstances as the present.

The only case to the contrary is that of *Westley v. Betts* (4), in the

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Leigh v. Barry, 3 Atk. 583, 584.

Lord Redesdale's Notes.

Clark v. Clark, 1 Cox, P. W. 83 note, and lately reported from Lord *Northampton* Mr. Eden, 1 vol. 357.

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time of Lord *Northington*. There were particular circumstances in that case; but I much question that determination. (5)

In the present case, the circumstances are very strong to induce me to adhere to the old rule. The party suffered the money to be out for a very long time in the hands of a *tradesman*, (6) [*] and neglected to call it in, notwithstanding the party interested in the fund was an infant: in such a case as this he is clearly chargeable; and therefore the exceptions must be over-ruled.

(5) The late Lord *Alvanley*, when M. R. adverting to what Lord *Thurlow* here says, nevertheless approved of *Westley v. Clarke*, with reference as it seems to the particular circumstances of it. See, however, note (1) *antea*.

(6) A power to lend trust-money on real or personal security held not to extend to a loan of it to a tradesman by way of accommodation, *Langston v. Ollivant*, Cooper, C. Ch. 33. See also *Wilkes v. Steward*, *ibid.* 6.

[*Vide S. C.*
1 Cox, 273.

Master of the
Rolls for Lord
Chancellor.

Lincoln's Inn
Hall, 24 July.

A contract to purchase lots; to two of the lots a title could not be made, and in others there had been a deterioration in point of value; if the value of the remaining lots is not affected by that deterioration a specific performance shall be decreed as to all but the two. (1)

POOLE against SHERGOLD.

(Reg. Lib. 1785. B. fol. 749. b.)

BILL for a specific performance of a purchase in lots. A good title could not be made to two of the lots, 9 and 11, without procuring a recovery to be suffered; and in others of the lots, there had been a deterioration. *Shergold* refusing to take the purchase; the bill was filed, and, upon the hearing, it was referred to the Master, to enquire whether a good title could be made, &c. The Master reported that a title could not be made to the two lots, and, as to the others, he reported a deterioration of 21l. 10s. for timber blown down, and the rest for coppice wood cut after the purchase.

Upon exceptions to the Master's report, the question was, whether under these circumstances, the defendant should be compelled to complete his purchase.

Mr. *Scott* and Mr. *Stanley* (for the defendant) contended, that, as acts remained to be done to perfect the title to the two lots, till those acts were performed, the defendant should not be compelled to perform his contract: or, at most, he shall not be decreed to pay costs.

Mr. *Madocks* (for the plaintiff).—With respect to the two lots; to be sure we must procure the trustees, and other necessary parties, to join: but, as to the other lots, no objection remains against the defendant's being compelled to complete his purchase; a deduction equal to the deterioration being made, which has arisen partly by accident, and partly by the default of the defendant, in not before completing the purchase, on account of which, it became necessary to cut the copse. If the want of title to the two lots was a deterioration to the others, it would have been taken notice of in the [*] Master's report; but he has not mentioned any such thing. The contract ought, therefore, to be carried into execution, except as to the two lots.

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(1) See the notes to the case of *Shirley v. Stratton*, *antea*, 1 vol. 440. In the principal case, was cited the case of the wharfinger, who, desirous to purchase a wharf for the purpose of his business, and contracting to take a house with the wharf, was ultimately compelled to take the house without the wharf. From the late Sir S. *Romilly's* notes, MSS. and 6 Ves. 676. where the report is mistaken in attributing the ultimate decision of the principal case to Lord *Thurlow*, although certainly His Lordship laid the foundation of the decision. See the judgment of the M. R. as extracted from Mr. Cox's Report in the last note to this case. A contract being to sell two undivided seventh shares of land, which were in one lot, and the vendor being unable to make a title as to one of the shares, the Vice-Chancellor refused to execute it; saying, the Lord Chancellor had held the like: and specially declaring, that "the two shares being contracted to be sold in one lot, and no good title made to one of them, the other party ought not to be held thereto." *Roffey v. Shatcross*, 19 July 1819.

Master

Master of the Rolls. (2) — Both parties seem to have been to blame: *Shergold* in resisting the contract *in toto*; the plaintiff in insisting upon it *in toto*. I must take it for granted, No. 9 and 11, are not so complicated with the other lots, as to entitle *Shergold* to resist the whole. If a purchase was made of a mansion-house, in one lot, and farms, &c. in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract. There must be no costs down to the reference; from that time, *Shergold* must pay costs. (3) It must be referred to the Master to settle conveyances of all the lots, except the two to which there is no title: the difference arising from the calamities of the times, ought not to rescind the contract.

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(2) Mr. Cox reports the judgment much more fully. It is thus in 1 Cox, 274. "M. R. The court has most certainly gone a very great length in compelling parties to go on with purchases contrary to their original agreement and intention; but I am clearly of opinion that a case might be made, where, if it turned out that the seller could not make a good title to a part, it might be a sufficient reason to put an end to the whole contract. Such was the case of the Cambridge-wharf, where it appeared that the seller could make a good title to all the estate, but the wharf, which was the principal object of the buyer in making the agreement. In that case the buyer was compelled to complete his purchase without the wharf, but it was a determination contrary to all justice and reason. But in the present case I am bound to suppose, that the lots to which no title can be made, are not of sufficient importance to make the loss of them a reason for vacating the agreement as to the remainder. The steps already taken in the cause by the Lord Chancellor, must have proceeded on the ground that the agreement was to be executed notwithstanding this defect, and the same observation applies to the fall in the value of land: with respect to the costs, I think both parties were at first to blame, but latterly Mr. *Shergold* only. I shall give no costs on either side down to the time of the Master's making his Report; but from that time the defendant must pay the plaintiff his costs."

(3) So much of the bill as related to lots 9. & 11. was dismissed with costs. No costs were given on either side down to the date of the Master's report, including that report; and the defendant was to pay the costs of the suit from that time. Reg. Lib.

Ex parte PAGE and Others, in the Matter of SAMUEL REMNANT,
a Bankrupt.

Lincoln's Inn
Hall, 1 August.

WILLIAM PAGE, 16th December, petitioned to be admitted, to prove under a separate commission taken out against *Samuel Remnant*.

Joint creditors
admitted to
prove and take
dividends under
a separate com-
mission against
one partner. (1)

Before the date, and suing forth of the commission against *Remnant*, he, together with one *James Hicks*, being jointly concerned in an attempt to raise the *Royal George*, the petitioners, at the request and joint account of the bankrupt and the said *James Hicks*, severally furnished divers goods and materials, for and in the prosecution of such their design, whereby they became indebted to the petitioners as follows:

To *Page*, 60*l.* 4*s.* 1*d.*
 White, 90*l.* 7*s.* 11*d.*
 Parmeter, 41*l.* 3*s.*
 Stephens, 45*l.* 10*s.* 6*d.*

The 14th August 1784, a separate commission was taken out against *Remnant*.

[*] The commissioners refused to let the creditors prove, because they were joint debts.

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This matter had been much argued, but at length Lord Chancellor made the following order:

(1) *Vide Ex parte Cobham*, 1 vol. 576. and the notes. *Ex parte Hodgson*, *antea*, 5. and *Ex parte Flintum*, the next case.

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Ex parte
PAGE.

That the petitioners be at liberty to go before the major part of the commissioners, named in the commission issued against *Remnant*, to prove their several and respective debts, and be admitted creditors under the said commission, for such sums as they shall so prove respectively, and be paid out of the estate and effects of said *Remnant*, a dividend in respect thereof, rateably, and in equal proportions, with the rest of the creditors of the said bankrupt.

Lincoln's Inn
Hall, 1 August.

Ex parte FLINTUM in the Matter of OYSTON.

S. P. but, after
a dividend, only
to be let in to
take future
dividends.

ON the 12th May 1773, *Dunn* and *Oyston* became partners, and on the 24th January 1783, the partnership was dissolved. During the partnership, they borrowed several sums of money, upon their joint bonds and promissory notes, for the purpose of carrying on their trade. On the 5th January 1785, a separate commission issued against *Oyston*. The present petitioners were joint creditors, and now prayed to be admitted to prove their joint debts under the separate commission against *Oyston*.

Mr. *Cooke*, for the assignees, was to have opposed the petition; but said, that since the order made in the case *ex parte Page*, he could not argue the point.

Lord Chancellor said. — He thought the point was settled, that the joint creditors might prove under the separate commission, especially since the case *ex parte Crisp*, 1 Atk. 133. which had decided that the joint creditors might sue out a separate commission.

The order was the same with the above; but there having been previous dividends, it was added that they should not be disturbed.

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[*] SITTINGS BEFORE MICHAELMAS TERM,

27 Geo. 3. 1786.

Lord Thurlow C.

MORGAN against HARRIS.

(Reg. Lib. 1785. B. fol. 654. b.)

Lincoln's Inn
Hall, October
31, 1786.

Bill by next of
kin, and [in-
tended] legatee
in an [unexe-
cuted] testa-
mentary paper,
before probate
or administra-
tion obtained,
against the
executor in a
former will, for an account of personal estate of the testator, [alleging fraud, collusion, &c.] Defendant demurs. — Demurrer over-ruled.

THE bill was filed by the plaintiff as next of kin and legatee of *Daniel Morgan*, deceased.

The bill stated, that the testator, on the 22d of December 1784, sent to *Pittman*, an attorney, to prepare his will, who attended him, and took instructions, from which having prepared a will, he attended the testator the next day, to fill up the blanks, and have it executed, but the testator was then too ill to execute it, and died upon the 24th: this unexecuted will was in favour of the plaintiff. A former will, made by the testator

in

in 1783, was proved by the defendants in the ecclesiastical court: this will the bill impeached, as having been obtained by fraud. Various proceedings had been had in the Ecclesiastical Court, and the probate called in. The suits ended in a compromise, and a release by the plaintiff, which the bill impeached, as fraudulently obtained from him by *Pittman*, who acted for him, colluding with the defendants; and further stated, that the defendants were in insolvent circumstances, and had got possession of the property. The bill therefore prayed, that the release might be set aside, an account of the personal estate taken, that a receiver might be appointed, (1) and the defendants restrained from receiving any more of the property, and that it might be paid into the bank, but prayed no particular application of the money.

[*] To the part of the bill praying an account, the defendants demurred.

Mr. *Munfield*, Mr. *Selwyn*, Mr. *Hardinge*, and Mr. *Stanley*, in support of the demurrer. — This is a demurrer for want of title. Until the plaintiff has established the testamentary paper, he has no claim to an account. There are cases where parties in litigation shall have such an account, because the question as to administration being undetermined, neither has an advantage over the other; but here, in fact, the party is not in a state to litigate; it is a part of the intent of the bill to put him into such a state. *Humphreys v. Humphreys*, 3 Peere Williams 349, is the case of a demurrer which may be compared to the present, though it is not exactly like it. In the present case, the release given by the plaintiff is charged to have been obtained by fraud, and the bill prays relief against it as so obtained, and adds a prayer for an account; which is irregular before the bar of the release is removed.

Mr. *Scott* and Mr. *Richards*, for the plaintiff. — The plaintiff's case is, that he is next of kin, and claims as such if *Daniel Morgan* died intestate, that is, if the former will was fraudulent; and in that character he claims an account of the personal estate. On the other hand, if the former will was not fraudulent, he then insists that the testator made a testamentary paper, which was read over to him, and which he approved, though he was afterwards incapable of executing it. If this paper was testamentary, the plaintiff derives rights under it by which he claims an account. It appears, that by the advice of *Pittman* a suit was commenced in the *Commons* for the purpose of procuring probate of this testamentary paper; but that *Pittman* afterwards colluding with the defendants, obtained a release from the plaintiff, in whatever character he might claim. One part of the prayer of the bill is to set aside that release; but the principal is to obtain an account of the personal estate, in order that it may be secured to abide the event of the suit in the ecclesiastical court, whenever it may be decided. It has been said that we come here in order to procure a right; but the question is, whether on this demurrer we are not in a state to allege a right. I say the right is tried, because they have admitted by the demurrer that the releases are fraudulent. The bill is to [*] secure the property: it states that the defendants are in insolvent circumstances, and are possessing themselves of the property, which they threaten to waste. In 1 Atk. 285, (*Phipps v. Steward*) a demurrer to a similar bill was over-ruled; so in *Andrews v. Powys*, 2 Brown's Parl. Cases, 476. There are two other cases, not so strong as the former, 1 Vern. 106, 2 Vern. 49. But this demurrer is also bad in point of form; it is a demurrer to the discovery of the personal estate; the discovery is only ancillary to the relief. If the demurrer with respect to that is bad, it is so as to the relief for which the

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(1) Lord *Hardwicke* C. refused to appoint a receiver pending a dispute in the Ecclesiastical Court concerning the probate. *Knight v. Duplessis*, 1 Ves. 324, 325.

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discovery is intended. Another part of the prayer of the bill is for a receiver, which is not covered by the demurrer; so, that the defendants may be restrained from receiving any more of the property: all which ought to be covered by the demurrer.

Mr. *Mansfield* in reply. — It is now admitted, that no cases the plaintiff can produce are similar to the present. If a probate of a will is once obtained, or an administration granted, it is not sufficient for a person to institute a suit upon any slight ground, to entitle him to come here for an account: somewhat more must appear. In *Powys* and *Andrews* a vast deal appears; and every body, upon reading it, must see the propriety of the order. In the present case, there is no charge of fraud upon the will of 1783, sufficient to affect a will proved in the ecclesiastical court. Of the latter will nothing is said, but that it has been carried into the ecclesiastical court, and made use of to get rid of the former will. The plaintiff, in order to have a discovery here, should shew upon what ground he is litigating in the ecclesiastical court, and how his libel is founded. As to the form of the demurrer, no relief is prayed but the setting aside the instrument; for although they pray that the money may be paid into the bank, they do not pray any disposition of it. The prayer of the discovery being bad, the defendant may, if he chooses, demur to it, without going on to the other parts of the bill.

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Lord *Chancellor*. — I was very much struck when the case was first moved, at the hardship of a person being obliged to give an answer upon such slight grounds; but there is more difficulty upon the court's deciding upon the degree of probability of success in the ecclesiastical court: I state this independent of the [*] fraud. I am afraid, after all the cases cited to me, that there can be no account and no security taken during a suit in the ecclesiastical court. But this case goes further. This bill states that the plaintiff's attorney was corruptly prevailed upon to advise his client not to sue. (2) He stands before me as a man suing an adversary confessedly afraid of the event of the suit, and ready to recur to wicked projects in order to guard against the event of the suit. When it goes on, this court will take care not to press the party as to paying the money in, without sufficient proof. Besides which, I think the demurrer bad in point of form. You cannot demur to a discovery, unless you demur to the relief; for then you do not demur to the thing required, but you demur to the means by which it is to be obtained.

Demurrer over-ruled.

(2) As in *Barnesly v. Powell*, 1 Ves. 284. Supplement to Vesey, 143. 149, 150, &c. Lord *Hardwicke* C. there ordered, "that the Master before whom the probate or letters testamentary granted to the defendant *S. B.* had been brought, should cause the same to be transmitted to, and lodged with the Registrar of the Court of Delegates, before whom an appeal was brought from the said probates by the committee of the plaintiff, the lunatic, on his behalf, and that the defendant *Mansell Powell* should, within a fortnight after the beginning of the then next term, bring in and deposit with the said Registrar the probate of the said will or letters testamentary granted to him, and that the defendants *B.* and *Powell* should, within a week after such probates or letters testamentary should be so brought in and lodged with the said Registrar, appear in the said court either by themselves or their proctor or proctors respectively, and consent to a reversal of the sentence for granting the said probates, or either of them, and to the revocation of both the said probates or letters testamentary, to the intent to enable the said Court of Delegates, by such consent as aforesaid, to cause the said probates or letters testamentary to be duly revoked according to the course of that court, &c."

1786.

[*] MICHAELMAS TERM,

[*125]

27 Geo. 3. 1786.

MAYOTT against MAYOTT.

Reg. Lib. 1786. B. fol. 40.) [On Exceptions and further Divisions.] *Rolls, 13 Nov. 1786.*

[T]HERE were two points in this case. The testator directed that his farm, which he held at will from Lord *Petre*, should be carried on by his cousin until the plaintiff should have a son who should attain 21 years; then he gave legacies of 200*l.* each to his nephews, and the residue to be laid out as directed in the will. (1) The landlord refusing

Legacies to be paid from a farm when *A.*'s son attains 21; the farm not being carried on, are not to be paid out of the residue.

Legacies to 1st and 2d cousins includes 1st cousins once removed, and a grand niece, not being more distant. (1)

(1) The case here is so short and incorrect, that it is proper to be detailed from the *Legist's Book*.

T. Mayott, by will dated 14th February 1782, (*inter alia*). directed the defendant, *M. of Ramsden Park*, to take possession of his farm and premises, which he held as tenant at will to Lord *Petre*, and of the stock, crops, effects, furniture, &c. immediately after his decease, and to carry on the farming business thereof as he should think most official. And the testator directed that the net produce arising therefrom in every year during which he should hold the same (if any) should be placed out at interest upon government security, in the name of *T. D.*, in trust, to remain at interest, and accumulate, until his nephew, the plaintiff, *J. M.* (then abroad) should have a son who should attain twenty-one: at which period, the defendant, *T. M.* should then resign up the business of the farm unto such son, together with such stock, crops, and furniture, as would amount to the sum of 1500*l.* But if no such son of the plaintiff should attain such age, then the testator bequeathed all such possession, stock, crops, and furniture and effects, to the same amount, unto the first son of his other nephew, the plaintiff, *E. M.* who should attain such age. And if no such son of either of his said nephews could attain twenty-one, then he gave the same amount of such stock and effects, &c. to the defendant, *T. M. of Little Burstead*. And after giving several legacies, bequeathed the residue of his monies, which he had directed to be placed out as aforesaid, in the name of the defendant, *T. M.* together with 300*l.* stock, and all other his personal estate and effects, unto the plaintiffs, and all his first and second cousins of the name of "*Mayott*," to be equally divided between such of them as should be living, upon the son of the said *John Mayott* attaining his age of twenty-one years, or in case he should have no son to attain that age, upon the son of the plaintiff, *T. E. Mayott* attaining his age of twenty-one; and in case he should have no son to attain that age, then, upon the said defendant, *T. Mayott, of Little Burstead*, his taking the said farm and stock; and he declared, that in order to obviate any doubts which might arise as to his meaning respecting the disposition of the farm he then held at *Mountnessing Hall*, and of which he had no lease, and concerning the disposition of the bulk of his fortune and property, he thought it necessary to say, that in case the landlord of the said farm should think fit to permit it, his wish was that the same should be occupied by one of the name of "*Mayott*," and that as the plaintiff *John Mayott* had not been brought up a farmer any more than the plaintiff, *E. Mayott, of Little Burstead*, he had therefore desired it to be carried in trust until a son of the plaintiff, *J. Mayott*, should be of age, when such son was to be fixed in it with stock, goods, and effects, to the amount of 1500*l.*; and 500*l.* was then to be vested for the benefit of the eldest son of the plaintiff, *T. E. Mayott*; and if there should be no son of the plaintiff, *John Mayott*, to be placed in the said farm, then the eldest son of the plaintiff, *E. Mayott*, was to be put in the said farm, with stock, goods, and effects to the same amount of 1500*l.*; and if neither of them should have a son to be placed in the said farm, then he declared, that the defendant, *T. Mayott, of Little Burstead*, should be placed

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against
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to grant a lease, or to suffer the farm to be carried on, the first question was, whether the legacies were payable as present legacies.

His Honor held they were legacies to be paid out of the property when the plaintiff's son should attain 21: and the farm not being carried on, according to the testator's wishes, could now never be raised.

The testator also gave legacies, out of stock, to his first and second cousins. He left at the time of his death one first cousin, the defendant, *Thomas Mayott*, three first cousins once removed, and a great niece. *His Honor* held they should all take, his intention being to give legacies to relations not more remote than second cousins.

placed in the said farm, with stock, goods, and effects to the like amount; and if such trust could not be carried into execution, or it should happen after carrying the same into execution for some time, by the death of the parties or otherwise, there should be an impossibility of having the same eventually fulfilled according to his intention, then he desired that the whole should be converted into ready money, and divided, as he had directed concerning the residue of his personal estate upon any one of the before-mentioned persons being placed in his said farm, and in such distribution, no "*female, first or second cousins married were to have any share*;" and he appointed *T. M. of Ramsden Park*, and the defendant, *T. M., of Little Burstead*, executors.

The Master, by his report, dated 31st July 1786, certified that the testator left at his death only one first cousin of the name of *Mayott*, viz. the defendant, *T. M., of Ramsden Park*; and no person of the name of *Mayott* who was strictly his second cousin: but that he left at his death three first cousins once removed, namely, the defendant, *T. M., of Little Burstead*; the defendant, *Mary Mayott* (then *Gardiner*), and *Susannah Mayott*, who were both unmarried at the death of the testator. From which he certified he had no second cousins of the name of *M.* at the time of his death. He certified also that the landlord gave notice to the executors to quit the farm at *Michaelmas* 1782, which they did: and that the executors had only held it from the testator's death on the 96th February 1782, till that period. Some exceptions to the report, on other grounds, were heard and over-ruled.

On the further directions, the court declared the personal estate to be divisible in seven equal parts among the plaintiffs, *T. E. Mayott* and *John Mayott*; and the defendants, *Thomas Mayott of Ramsden Park*, and *T. M. of Little Burstead*, the defendant *Mary* the wife of *G. Gardiner*, the defendant *Susannah Mayott*, and the defendant *Mary Ann Mayott*. R. L.

[J. HORNE] *TOOKE against HARTLEY.* [20 November.]

[Vide S. C.
2 Dick. 785.]

(Reg. Lib. 1786. B. fol. 19.)

Representatives
of mortgagee,
after foreclo-
sure; sell the

mortgaged pre-
mises; and the amount not being sufficient to pay the debt, bring an action on the bond. — Injunction to restrain their proceeding [dissolved. (1)]

EDRIDGE, on the 20th of June 1771, made a mortgage of some leasehold premises to *Philip Rosindale*, to whom the defendants are executors,

(1) Lord *Thurlow*'s clear opinion was, that an action might be brought for the difference, if the mortgaged estate were sold out and out fairly, without collusion, and for the best price, and not as (through some mistake) stated in *Perry v. Barker*, 8 Ves. 531. if the estate still remained in the possession of the mortgagee. See a much better report of this case in 2 Dick. 785. The judgment in the principal case, as there stated, is as follows: "His Lordship was clear that the defendant, the mortgagee, under the mortgagor's covenant in the mortgage-deed was entitled to be paid what was due on the mortgage; that so long as he kept the estate he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say any thing was due; but if he sold the estate fairly and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due; and to the extent of what it did not, the mortgagee had a right, and so it was now established, to bring an action against the mortgagor to recover the deficiency; and therefore his Lordship disallowed the cause, and dissolved the injunction."

The

executors, for 1200*l.* He afterwards, 25th June [*] 1771, sold the premises to *Warren* for 1500*l.* *Warren*, in June 1774, paid off 100*l.* of the mortgage money; in April 1775, he paid another 100*l.* *Warren* died in October 1776. *Peter Warren*, his nephew and representative, in May 1777, paid off 200*l.* of the mortgage money. In 1778 *Rosindale* filed his bill against the representatives of *Warren*, to foreclose the equity of redemption; and in 1780 obtained a decree for that purpose, which became absolute: *Rosindale* was accordingly in possession. The value of the premises not being equal to the mortgage money, the defendants, executors of *Rosindale*, put up the premises to sale by public auction; but no sum being bid equal, in their opinion, to the value, the premises were bought in by a trustee for them, at 400*l.* Notice of the day and time of sale had been sent to *Tooke*, who was the executor of *Edridge*. The defendants, as executors of *Rosindale*, afterwards brought an action against *Tooke*, as executor of *Edridge*, on the bond, for the remainder of the mortgage money unsatisfied by the sale of the estate, and obtained judgment at law. *Tooke* filed this bill, praying an injunction, and that the bond might be delivered up to be cancelled; insisting that the mortgagee, having foreclosed the equity of redemption, and taken the pledge, had made his election, and relinquished his right to a personal remedy.

Mr. *Mansfield* (2), (for the plaintiff,) — said, that the mortgagor having sold the estate, and the foreclosure being against the purchaser, made this stronger in the plaintiff's favour than the ordinary case.

Mr. *Madocks* and Mr. *Cooke* (for defendants). — The property remains in the hands of the representatives of the mortgagee. It must be admitted, that the defendants having brought an action on the bond, has opened the right of the plaintiffs to redeem. *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317. The defendants are certainly entitled to proceed upon the bond for what the pledge proves deficient to pay. There is no fraud in this case. The plaintiff had notice of the day and time of the sale; so that he might have prevented the sale by redeeming.

Lord Chancellor said, — As it was a new case, he would grant the injunction, on condition of the plaintiff's bringing the [*] money into Court (3), but his opinion was, that the defendants had a right to proceed at law.

The plaintiffs refused to bring the money into Court, because they said they had not assets. The injunction therefore was refused.

The Editor is the more anxious to state the above, since Mr. Cox's Report was not published in 1813, when *Perry v. Barker* was decided; and since Lord Eldon C. in that case said, "the principal case was very ill reported by Mr. Brown." Editor's MS. note.

The Editor has been also favoured with another MS. note of the principal case by Lord Colchester, which appears to have been taken by the present C. Baron (Sir R. Richards) from whence also it appears that the mortgagee had actually sold the estate. The substance of Mr. *Mansfield's* argument, and the judgment as there given, are as follows:—

"Mr. *Mansfield* strongly insisted that the defendant ought to be restrained, for that if he had kept the estate after the foreclosure, upon suing the bond at law, the foreclosure, by the rules of equity, would have been opened; and, the mortgagor, on paying the debt, might have had his estate again. That as he was precluded from this by the sale of the estate by the mortgagee, the debt must in equity be considered as satisfied and gone; that it might open a door to collusion in the sale of mortgaged estates, and would be very oppressive upon the borrower.

"Lord Chancellor held the mortgagee, after foreclosure absolute, had a right to sell the estate and sue his bond too, and that there was no reason the lender should lose part of his debt and be prevented from enforcing the additional security he had taken; and refused [to continue] the injunction.

"He offered to continue the injunction to a hearing, being a new point in species, if the plaintiffs would bring the money into court, but the plaintiff not being able to do that, he refused the injunction." From Lord Colchester's MS.

(2) And Mr. *Waller*. Reg. Lib.

(3) Lord Eldon C. pursued this course in *Perry v. Barker*, 8 Ves. 527. 531.

1786.

TOOK
against
HARTLEY.

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1786.

ROBINSON *against* FITZHERBERT.

(Reg. Lib. 1786. B. fol. 107.)

•
Rolls, 6 Dec.
1786.

Interest of a sum given to A. for life, at his death to devolve to the heir of his body, with remainder over, vests the principal sum absolutely in A. (1)

THOMAS SNELL by his will gave [*inter alia*] as follows:—"Item, "I give and bequeath to *Thomas Moore Slade*, during the term of "his natural life, the interest of 1000*l.* 3 *per cent.* consol. annuities, to "commence the day after my death, to be regularly paid, from time to "time, in ten days, or as soon as possible after the same becomes due. "At his decease it is to devolve to the heir of his body lawfully begotten; "and in default of issue (1), I give and bequeath the same to the heirs "of Captain *John Inglefield*, that shall be then living, in equal shares, "to be divided."

The Master of the Rolls held that the legacy vested absolutely in *Thomas Moore Slade*, and ordered the same to be paid to him.

(1) See *Butterfield v. Butterfield*, 1 Ves. 133. 154. and Supplement, 81. S. P. Vide also Mr. Sanders' note to *Hodgson v. Bassey*, 2 Atk. 89.

Lincoln's Inn
Hall, 9 Dec.
1786.

Although a defendant has appeared, and answered the original bill, if he cannot be found to be served with a subpoena to answer a bill of revivor, the plaintiff must proceed under 5 Geo. 2. c. 25. to have the bill taken *pro confesso*.

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HENDERSON and Others *against* MEGGS and others.

RAWLINSON, in Hilary term 1785, exhibited his bill against *Thomas* and *John Meggs*, to foreclose the equity of redemption of a mortgage. On the 14th of June 1785, a commission of bankrupt issued against *John Meggs*; upon which a supplemental bill was filed, making his assignees parties. *Rawlinson* dying, his executors filed a bill of revivor; but not being able to find *John Meggs*, the bankrupt, to serve him with the subpoena,

Mr. Cooke, on the 5th of December 1786, moved, that service of the subpoena on the defendant's clerk in court might be deemed good service; and supported his motion by an affidavit, [*] that the defendant had appeared and answered the original bill, and that enquiry had been made at his last place of abode, and of his clerk in court, and solicitor, without being able to hear of him.

Lord Chancellor ordered it to be moved again at the next seal; and it being now mentioned, his Lordship refused the motion, saying the plaintiff must proceed under the statute 5 Geo. 2. c. 25. for taking the bill *pro confesso*.

Vide 3 Atkyns, 690.

1786.

Between CATHARINE TRACY, Widow, and others, - Plaintiffs.

The Right Honourable HENRIETTA CHARLOTTE TRACY, Viscountess Dowager of Hereford; FRANCIS CHARTERIS, Esq.; and SUSAN his Wife, FRANCIS CHARTERIS the Younger, an Infant, and others, - - - - - Defendants.

Lincoln's Inn
Hall, 15 Dec.
1786.

(Reg. Lib. 1786. B. fol. 115.)

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THIS was a petition of appeal of the defendant *Henrietta Charlotte Tracy*, Viscountess Dowager of *Hereford*, from the decree of his Honor the *Master of the Rolls*.

It states that the plaintiffs, in Hilary vacation 1785, filed their bill against the petitioner and the other defendants thereto, stating indentures of lease and release, bearing date the 4th and 5th days of August 1735, being a settlement made previous to, and in consideration of, the marriage of *Robert Tracy*, the petitioner's late uncle, then of *Stanway*, in the county of *Gloucester*, Esq. but now deceased, with *Anna Maria Hudson*, the wife, and afterwards the widow of the said *Robert Tracy*, and now also deceased; whereby the said *Robert Tracy* conveyed and assured divers manors, messuages, lands, and hereditaments, in the counties [*] of *Gloucester* and *Worcester*, therein described, from and after the solemnization of the said then intended marriage, to the use of the said *Robert Tracy* for life, with remainder as to the capital messuage called *Stanway Hall*, (the seat of the family,) and several estates, then let at yearly rents amounting to 1215*l.* 10*s.* to the said *Anna Maria* for her life, for her jointure; and after the death of the said *Anna Maria*, and also as to the rest of the estate from the death of the said *Robert Tracy*, to trustees for 300 years, upon trusts long since determined; remainder to the first and the other sons of the marriage in tail male; remainder to trustees for 500 years, on trusts which never took effect; remainder to the first and other sons of said *Robert Tracy* by any other wife, remainder to *John Tracy* (afterwards *Atkyns*) for life; remainder to his first and other sons in tail male, with remainder to *Thomas Tracy* and his issue male in like manner, remainder to trustees for 1000 years, upon trust to raise 10,000*l.* on failure of issue male of *Robert*, *John*, and *Thomas*; remainder to *Anthony Keck* (formerly *Tracy*), father of the petitioner Lady *Hereford*, for life; remainder to his first and other sons in tail male, with remainder to *Robert Tracy* in fee; and also stating, that in such settlement was a power to

[Tenant for life bound to keep down the interest of incumbrances, although the whole should be exhausted. (1)] An estate being settled to A. for life, then as to part to B. for life, remainder as to the whole to uses under which the defendant takes as tenant for life, with powers to A. to charge (but not to encumber B.'s estate for life): the estate given in remainder falls in during B.'s life, and the interest of the charges exhausts the rents and profits. Upon B.'s life-estate falling in, the first rents and profits of that portion of the estate shall be

applied in discharge of the arrear, which shall not be a charge upon the inheritance. (1)

(1) *S. P. Revel v. Watkinson*, 1 Vesey, 93. Supplement, 56. It is singular that this case in *Vesey* was not referred to by any of the counsel in the principal case, at either of the hearings. — *EX INFORMATION*.

S. P. also *Gwillim v. Holland*, 14th October 1741. — (Lord Redesdale's notes. [Reg. Lib. 1740. A. fol. 631. b.]

In that case, the tenant for life (who was tenant by the curtesy) was ordered to keep down the interest of the mortgages and incumbrances which had accrued since the death of his wife, and should accrue during his life. Reg. Lib.

S. P. also *Montkysfield v. Bunbury*, 3 March 1759, per Lord Henley, Keeper. [Reg. Lib. 1758. B. fol. 476.] The widow and executrix was there, out of what should be found coming on the account of rents and profits received by her, to keep down the interest of the incumbrances on the real estate, to the extent of what she had, or should receive, out of the rents and profits thereof. — Lord Redesdale's notes and Reg. Lib.

1786.

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against
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Robert Tracy to charge the estates (except those limited to his wife during her life) with any sum not exceeding 4000*l.* for such uses as he should appoint; and in default of appointment, for increase of the portions of his sisters and younger brothers, except *Anthony Keck* and *Ann Travell*; and in case of failure of issue male of the said *Robert Tracy* by the said *Anna Maria*, to charge the estates with a further sum, not exceeding 3000*l.*

Robert Tracy, by several deeds, charged the estates under his power to charge with 4000*l.* with several sums, amounting in the whole to 3900*l.* which was actually raised by mortgage in his life-time; and with a further sum of 1090*l.* for his brother, the said *John Tracy Atkyns*, which was not payable till his death, and which was claimed by the bill by the plaintiff, *Catharine Tracy*, the widow and executrix of the said *John Tracy Atkyns*; and the said *Robert Tracy* also charged the said estates with the 3000*l.* aforesaid, which was raised by mortgage after his death, and had no issue by the said *Anna Maria*; and made his will, whereby he devised his estates, in case of failure of issue male of himself and his brothers [*] *John*, *Thomas*, and *Anthony*, (all of which happened,) to the petitioner Lady *Hereford*, the eldest daughter of his brother *Anthony*, for life; remainder to her first and other sons in tail male; remainder to her sister, the defendant, *Susan Charteris*, for life; remainder to her first and other sons in tail male, with remainders over; and directed Lady *Hereford* and the successive devisees to take the name of *Tracy*; and he charged his estates with the sum of 2000*l.* for the benefit of his nieces, the daughters of his sister *Travell*, on failure of issue male of himself and his brothers, and when the 3000*l.* before charged under the power contained in the settlement should be raised and paid, and the estates should be actually discharged therefrom. Upon the 28th of *December* 1768 the said *Robert Tracy* died without issue, leaving the said *John Tracy Atkyns* his brother and heir; and *Anthony* also died without issue male, in the life-time of the said *Robert Tracy*; and *Thomas Tracy* afterwards died without issue male, in the life-time of the said *John Tracy Atkyns*; and on the 23d of *July* 1773 the said *John Tracy Atkyns* died without issue, whereupon the limitation in the will of *Robert Tracy* to the petitioner took effect.

That the bill further stated divers debts and incumbrances affecting the estate of the said *Robert Tracy*, and also sale of part of his estates under an act of parliament, and the application of the purchase money; and prayed that so much or such a sum of money might be levied or raised by sale or mortgage of all and every the manors, messuages, lands, tenements, and hereditaments, and real estate of the said testator *Robert Tracy*, deceased, so devised by his will, or a competent part thereof, under the authority and decree of the Court, as, together with the sum of 688*l.* 8*s.* 8*d.* cash in the bank, standing in the name of the accountants-general of the Court, placed to the credit of the matter *ex parte* the devisees named in the will of the said *Robert Tracy*, deceased, as would be sufficient to pay the several sums of money, debts, demands, and incumbrances therein mentioned, and all interest due and to become thereon; and that all proper parties might be decreed to join in such sale or mortgage; and that the money arising from such sale or sale together with the said sum of 688*l.* 8*s.* 8*d.* might be applied in payment and discharge of the several debts and incumbrances.

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[*] That the facts were admitted by the defendant's answers; and the cause was heard upon the 16th day of *February* 1786, when his Honor amongst other things (2), directed accounts of the debts of the said *Robert Tracy* remaining unsatisfied, consisting of the said 1000*l.* claimed by the

(2) The Report agrees, upon examination, with the Registrar's Book.

plaintiff

plaintiff, *Catharine Tracy*, as representative of the said *John Tracy Atkyns*, and a debt claimed by *Dorothy Serle*, a plaintiff in this cause, and the legacy of 2000*l.* and of the interest accrued due on such debts and legacy respectively; and ordered that what should appear to be remaining due, under the directions therein given, for interest on the residue of the said sum of 1090*l.* after such deduction as therein mentioned, and also what should appear, under the directions therein given, to be due for interest of the said legacy of 2000*l.* and also so much of the interest of the said *Dorothy Serle's* debt as should appear to have accrued since the death of the said *John Tracy Atkyns*, should be paid by the petitioner out of the rents and profits of the real estate of the said testator, *Robert Tracy*, of which the petitioner was, at the time of the said decree, tenant for life, accrued since the death of the said *John Tracy Atkyns*, after keeping down thereout the interest of the mortgages subsisting thereon, so far as the same would extend; and in case the petitioner should not admit the rents and profits of the said estate to be sufficient for that purpose, then that the petitioner should account before the Master for such rents and profits accrued since the death of the said *John Tracy Atkyns*; and the said defendant was, from time to time, directed to account before the said Master for such rents and profits, and to apply the same in discharge of such interest, till the same should be fully paid and satisfied, reserving the consideration how and in what manner so much of such interest as should then remain due should be made good, with liberty, in that event, for any of the parties to apply to the Court concerning the same, as they should be advised.

That at the time of filing the said bill, the said *Anna Maria*, the widow of the said *Robert Tracy*, was living, and in possession of the estates of the annual value of 1215*l.* limited to her for life by the said settlement as aforesaid; and the said *Anna Maria* did not die till the month of August 1785, whereupon, and not before, the petitioner became, under the will of the said *Robert Tracy*, tenant for life of such estates, but the plaintiffs did not [*] file any supplemental bill on the death of the said *Anna Maria Tracy*.

That the rents and profits of the estates, of which the petitioner became tenant for life on the death of the said *John Tracy Atkyns*, and of which the petitioner was in possession at the time of filing the said bill, and until the death of the said *Anna Maria Tracy*, were not nearly sufficient to pay the interest of the several mortgages and incumbrances affecting the same, and of the debts and legacies directed to be raised by the said decree; so that after exhausting all such rents and profits, a large sum of money remains due for interest accrued after the death of said *John Tracy Atkyns*, and before the death of said *Anna Maria Tracy*.

That the petitioner therefore conceived herself aggrieved by the said decree, in regard the same directs all interest which accrued after the death of said *John Tracy Atkyns*, on such debts, charges, and incumbrances as aforesaid, to be paid by the petitioner, out of the rents and profits of the estates of which the petitioner, at the time of said decree, was tenant for life, and which directs her to account for such rents and profits as aforesaid; which direction includes the estates of which the petitioner became tenant for life on the death of the said *Anna Maria Tracy*, as well as those of which the petitioner became tenant for life on the death of said *John Tracy Atkyns*, insisting that the rents and profits only of such estates of which the petitioner became tenant for life on the death of the said *John Tracy Atkyns*, and was in possession of, before the death of *Anna Maria Tracy*, ought to be applied in payment of the interest aforesaid, which accrued before the death of the said *Anna Maria Tracy*; and that the excess of such interest beyond the amount

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of such rents and profits ought to be made a charge upon the inheritance of the said estates, and not on the future rents and profits of the said estates of which the petitioner became tenant for life on the death of said *Anna Maria Tracy*; and that therefore the said decree ought to have directed the application only of rents and profits of the estates of which the petitioner was tenant for life at the time of the filing the said bill, and not of the estates of which the petitioner was tenant for life at the time of pronouncing the decree, no supplemental bill having been filed on [*] the death of the said *Anna Maria Tracy*, or upon the suggestion on the part of the plaintiffs, and admission by the petitioner, that the said *Anna Maria Tracy* was dead since filing such bill, the said decree ought to have directed an enquiry of what estates your petitioner became tenant for life upon the death of the said *John Tracy Atkyns*, and of whose estates the petitioner had since become tenant for life, and particularly upon the death of the said *Anna Maria Tracy*; and ought to have directed the application of the rents and profits of the estates, of which the petitioner had, from time to time, been tenant for life, to be applied in discharge of the interest which had accrued during the same time, and particularly before the death of the said *Anna Maria Tracy*; and that the amount of such interest beyond the amount of such rents and profits of the estates of which the petitioner was tenant for life before the death of the said *Anna Maria Tracy*, should be charged on the inheritance of the said estates, and raised by sale or mortgage thereof; or such other directions ought to have been given with respect to the matters aforesaid, as would have been equitable and just, according to the rights of the petitioner, and the several persons entitled in remainder after her, under the said will of the said *Robert Tracy*, and particularly such directions as would not have compelled the petitioner to apply the rents and profits of the estates of which she became tenant for life, on the death of the said *Anna Maria Tracy*, in discharge of interest which accrued due before the death of the said *Anna Maria Tracy*.

Upon the hearing of this appeal, the 15th of December 1786, the want of a supplemental bill being matter of form only, was but slightly insisted upon.

Mr. *Madocks*, Mr. *Scott*, and Mr. *Mitford* contended, on the part of Lady *Hereford*, that the decree of the Master of the Rolls was erroneous, in as much as it directed the arrear of interest on the charges in general, which exceeded the whole amount of the rents and profits of the estate into possession of which she came on the death of *John Tracy Atkyns*, to be a charge on the rents to accrue in respect of the estate to which she became entitled in 1785, by the death of *Anna Maria*, the widow of *Robert Tracy*, instead of decreeing the same to be, as they insisted it ought to be, a charge on the inheritance. This question was [*] argued particularly by Mr. *Scott* and Mr. *Mitford*, on two grounds: 1st, On the intention of the testator; — 2dly, On the rule of the court between persons claiming different interests in lands subject to charges.

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Mr. *Scott* contended, that there was an obligation upon persons having several interests in real estates, to contribute towards the discharge of the incumbrance; and in consequence of that obligation it was, that a court of equity would compel every part of the ownership to bear a part of the incumbrance, as laid down by Lord *Hardwicke*, in the case of *Amesbury v. Brown*, 1 Vesey, 480. (3); that the proportion of this contribution had been originally ascertained by a fixed rule, which had, however, of late years given way to a more equitable method of distribution. There is indeed one species of estate which is not obliged to such a contribution, an estate tail in possession, a tenant in tail in pos-

(3) See also *Revel v. Watkinson*, 1 Ves. 95.

tion not being obliged to contribute any thing, as he may make him-
 self owner of the estate; but if he is himself the mortgagee, the court
 will apply the rents to the payment of the interest of the mortgage, and
 will compel the remainder-man to pay the interest out of the inheritance,
 as appears by the case cited; but the question in this case is, whether
John Hereford was obliged, as tenant for life, to keep down the in-
 terest, as between her and the remainder-man; this would admit of
 no doubt, had the estate of which she was tenant for life been an estate
 in possession, and not in reversion; but being an estate in reversion only,
 there is no case in which she can be compelled to keep down the in-
 terest; nor does her being in possession of the other part of the estate
 make any difference. If the estate for life of the part in possession had
 been given to her, and an estate for life in the part in reversion had been
 given to another person, there would not be a pretence to charge that
 other person with the interest of the charge, the tenant being merely
 answerable during the time he is in possession of the estate. With re-
 spect to that part, it is the case of a dry reversion, subject to a mortgage,
 devised to one for life. Upon the expiration of the former estate, the
 reversion would come into possession; but the tenant for life could not
 be liable to pay, out of rents and profits to accrue, the interest which
 had become due upon the mortgage before he came into possession.
 Such a decision would totally destroy the value of the ownership, if the
 charge should be [*] equal to the whole of his estate (†): but if he is
 liable to the interest only during his possession, that divides the burthen
 fairly between his ownership and the inheritance, which must be the in-
 tention of the testator, who means that every person to whom he gives
 any interest in the premises shall take a valuable ownership, and that
 the burthen shall be borne not by one only, but by all. This intention
 can only be effected by making the accumulated interest, before the re-
 version fell into possession, principal, of which the tenant for life, during
 his possession, is to pay the interest, and the principal to be borne by
 the inheritance. His Honor laid down the principle to be, that the
 estate should go from each taker to his successor in as good condition as
 he received it in; but if the tenant for life must discharge the accumu-
 lated arrear of interest before the estate came into possession, it would
 go into the hands of the next taker in a better condition than it came to
 those of the tenant for life, as the rents and profits accruing during the
 life estate of the latter might be exhausted in discharging the accumu-
 lation of interest, and the estate would go over to the next taker clear
 and unincumbered. The persons taking being, therefore, bound only to
 keep down the interest during their respective possessions, and intended
 by the testator only so to do, a reversioner for life, during the time that
 the estate is expectant and totally unproductive as to him, cannot be
 bound to discharge the arrear accumulated during the expectancy, out
 of his life estate when it falls in. In another respect this determination
 would be inequitable; it would impute to the less valuable portion of
 the estate, the tenancy for life, a burthen to diminish its value, in order
 to the value of the portion of the estate already the more valu-
 able inheritance. This would be another infraction of his Honor's
 that the estate should go over to the successive owner in as good a
 condition as it came into the hands of the prior tenant, as, if the tenant for
 life assesses but for a short time, his share of the rents and profits must
 early be exhausted for the benefit of the remainder-man, whereas
 if the arrear converted into principal, he will only have the in-
 terest of that principal to keep down. It would farther be to infer,

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* *Cor's* note on this sentence substitutes the following: — "though the charge
 was equal to the whole of his estate."

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against his Honor's rule, that the testator meant to throw the whole burthen upon the first taker for life, instead of giving him a proportional bounty with the other takers of the estate; I conceive, therefore, the rule cannot be, that the first taker for [*] life shall bear all the by-past interest, and that the rule can only be, that he shall keep down the interest during his own possession, the rule generally laid down applying only to estates in possession, and not to a dry reversion.

Mr. *Milford* argued, that this was not properly a question of intention; the only question was, what was the measure of equity between the parties. The rule urged against Lady *Hereford* is, that the tenant for life is to keep down the interest during her life; but this rule is not an absolute one, it is adopted only as a rule of convenience, as a medium by which to apply the rule of equity, which is, that a due proportion of the charge shall be borne by every taker. The question, properly considered, is a question of contribution, where different estates, subject to a general charge, are given to different persons; if the rule applies, it must also be the same where different portions of the same estate are given; there can be no difference between the cases: the matter to be decided is, in what proportion they shall contribute to the general burthen. In the case of tenant for life, with a remainder in fee, the court appears to have settled the point, that each shall contribute according to the value of the different estates. It was a rule early adopted as the measure of that value, that the estate for life should be valued as one third, the inheritance at two thirds, although it has been since treated as obsolete. That rule was only a medium to obtain justice. It was applied as such in *Brent v. Best*, 1 Vern. 69, where, upon a bill to redeem, the mortgagee having devised the land to his wife for life, remainder to *B.* in fee, it was decreed that one third of the mortgage money should be paid to the wife, the other two thirds to the remainder-man; so where there was a devise by mortgagor of the lands in mortgage, the tenant for life was decreed to pay one third, the remainder-man two thirds, *Cornish v. Mew*, 1 Chanc. Ca. 271. But this rule did not produce justice, and therefore, where the tenant for life was dead before the bill filed, the Court decreed that his representative should contribute only for the time during which he enjoyed the estate, *Clyat v. Battenon*, 1 Vern. 404. The Court did not consider the rule as imperative, but only to be applied where it produced justice: for this purpose, as what the tenant for life has is only the rent and profits, and the remainder-man has the estate, the Court modified the rule to this, that the [*] tenant for life should pay the interest, and the debt be a charge on the estate, following the idea, that whoever took a portion of the estate should bear a share of the burthen. This rule in general is a just rule, as it apportiones the burthen fairly between the parties, where there is a possession; but where the interest of the incumbrance exceeds the produce of the estate, there the rule ceases to be just, for it would be imposing a burthen instead of giving a bounty. The principle of contributing according to the actual possession only, has been applied in the case of renewing leases. In *Nightingale v. Lawson*, (*ante*, vol. 1. p. 440.) the point was much insisted upon before the *Master of the Rolls*, that the estate in possession and the reversion being one estate, she should be charged as a tenant in possession: her estate was decreed only to bear its proportion in regard of the time of her enjoyment. If the rule is a positive rule, it must prevail throughout, even if Lady *Hereford* had received but 10s. a-year. Suppose 10s. a-year only had descended upon her, and the jointresses had lived twenty years, and she herself should live long enough to pay the arrear only, her whole estate would be taken from her, and nothing from the remainder-man, who would be liable to the principal only. But the rule I have laid down,

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of

ring in proportion only, has been applied. It was applied in *Clyat v. Batteson*, and again in *Heningham v. Heningham*, 355. to this very case of an estate in possession and an estate in reversion; for in that case two estates, the one in *Norfolk*, the other in *Suffolk*, being subject to raise a portion out of a reversionary term, to be paid after the death of different tenants for life, on the different terms, the life on the *Suffolk* estate fell, and the daughter bringing her bill against the termor, obtained a decree that the term should be sold to raise the portion. The termor paid the portion, and the other life tenant brought his bill against the defendant, upon whom the *Norfolk* estate had descended, (who was the daughter,) for contribution, and that the *Norfolk* estate should contribute in proportion, but that the *Suffolk* estate should be valued as an estate in possession, the *Norfolk* estate as an estate in reversion only. In *Thynn v. Duvall*, 2 Vern. 607. the Court, on a bill to redeem or foreclose, ordered the defendant, for life of the equity of redemption, to file a bill to have a sale, the mortgage debt paid, and the surplus distributed among the tenants and remainder-men, [*] according to their proportions. If the rule be adopted which is proposed by the plaintiffs in this case, *Clereford's* life estate will be charged greatly beyond her proportion to the value; and no intention appearing on the part of the testator that she should so largely contribute, the rule should not be so applied. It is just that the rents of the estates which she took in possession should be so applied, but those of the estates in reversion ought to be applied to the future interest, and to keep down the interest of the remaindermen considered as principal. In *Guillam v. Holland*, 11 Nov. 1786. mentioned in 2 Atk. 343. on another point,) as it appears in a printed note of the case, in the late Mr. Brown's copy of *Equity bridged*, the husband of a feme, tenant in fee of an estate subject to debts, having received the rents without paying the debts, and keeping down the interest during the life of the wife, upon her death he filed a bill against the surviving husband, to have the debts received applied in payment of the debts. Lord Hardwicke held that the accumulation should fall upon the estate; and that the husband, during the coverture, had the same right the feme would have had if sole; and that he might retain the rents received during her life; and although *Brompfield v. Brompton*, 2 Vern. 566. was decided otherwise, yet that note is queried in *Vernon*; and Lord Hardwicke certainly meant to negative that result, by his determination of *Guillam v. Holland*.

Chancellor (without hearing the counsel for the plaintiffs) said, that the rule appeared to him to be right. The counsel have argued the matter in different ways; the one upon the intention of the testator, the other upon the rule of equity to cause a contribution between the takers of the estates. With respect to the latter ground, no rule has ever been established that two estates in the same land shall contribute in proportion to their respective values, in such a case as this: if there had, the Court would have marked it by valuing the estate for life, then valuing the reversion, and decreeing each to bear its proportion; but this has never been done, but where the estate has ceased to have continuance by some act of the donor's; there the charge has rested on the reversion. A tenant for life without impeachment of waste cannot sell the timber on the estate, nor take the produce of mines unopened, both of which are the property of the person entitled to the inheritance; yet if the estate is sold to pay debts, the Court gives a life estate in the interest of the [*] surplus money to the tenant for life, although the sum is in part of the property that which belonged to the inheritance, and would have been the tenant for life no profit; but, according to the argument, all the increased surplus ought to go to the remainder-man in fee; so in

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cases where there have been contingencies which might increase the value of the tenant for life's estate, there is no instance where the Court has calculated the value of such contingency, in order to burthen the estate of the tenant for life, further than keeping down the interest of a charge out of the annual rents and profits. It has only compelled the application of the rents year by year, to keep down the interest of the charge; and if this rule were departed from, it would be impossible to draw the line what proportion each part of the estate should pay. (5) Then as a question of intention, I agree it is so; the testator considered it as a fund to be divided, and that each tenant for life should leave the estate to his successor in as good condition as he found it; his intention was, therefore, to give it, subject to all reprises; all reprises must, therefore, be borne by each tenant for life. The counsel have put cases which might not occur to the testator. Cases often happen, where the rule must deprive the donee of every thing. The argument supposes the testator meant to give each a certain benefit; but he did not give a certainty, he gave no certain term. Arguing in that manner is arguing wide of his intention. A man who gives a contingent estate, as a life estate in a reversion must be, gives that which may or may not be productive: yet she might have made it certain by selling her interest; but as every contingency may or may not be productive, all she can take is the surplus after such charges as affect the contingency she is to take. The intention of the testator, therefore, will be fully satisfied by applying the common rule of the Court, that the taker of two funds, one productive, the other unproductive, must keep down the interest of the charges upon them and pay off the accrued interest out of the rents and profits of the reversion, before she can take any benefit of the devise, and cannot throw the charge on the reversion. By this decree she can never be injured, as, if the estate produces nothing, she never can be charged with any thing.

The decree therefore must be affirmed.

(5) See *Revel v. Watkinson*, 1 Ves. 93, &c.

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[*] ROBERTSON against Sr. JOHN.

(Reg. Lib. 1786. B. fol. 74.)

Lincoln's Inn
Hall, 16 Dec.

Promise to re-
new a lease, in
consequence of
money already
laid out, is *nu-
dum pactum*,
and not be spe-
cifically per-
formed; and
money laid out
afterwards will
not vary it.
[On this ground
a demurrer
allowed.]

BILL by the assignees of *Merriman*, a bankrupt, against the de-
fendant, for a specific performance of an agreement.

The defendant demurred (1), and the case appeared to be this:

Lord *Bolingbroke*, tenant for life with remainder to the defendant, had granted a lease for thirty-one years, and had covenanted that when the defendant, his son, should come of age, he should confirm the lease.

Soon after the defendant came of age, *Merriman* wrote to him, stating the agreement with his father, and that, in consequence of it, he had laid out considerable sums. To this letter the defendant wrote the following answer: "The agreement certainly does not bind me; but the money you have laid out certainly entitles you to a renewal of the lease from me, which I shall be happy to give you, on this con-

(1) The demurrer was "to so much of the bill as prayed that the defendant might be compelled to a specific performance of the agreement mentioned in the plaintiff's bill, or that prayed any relief touching the matters therein complained of; the said defendant insisting that there was not any thing in the said bill contained (supposing, but not admitting, the several allegations thereof to be true,) to entitle the plaintiff in a court of equity to the relief prayed, or to any other relief." Reg. Lib.

"sideration."

"sideration." The bill further stated the bankruptcy of *Merriman*, and that he and the assignees (the plaintiffs) had laid out further sums on the premises.

In support of the demurrer it was argued, that this was *nudum pactum*.

For the plaintiffs it was contended, that they and the bankrupt having laid out money in consequence of the agreement, it would be a fraud not to carry it into execution.

Lord Chancellor said, — The intention of laying out further sums of money not being mentioned in the letter, the promise was *nudum pactum*, which equity would not perform in specie, although had he stated that intention, and the promise had been founded upon it, the plaintiff should have had a specific performance. The circumstance of laying out money afterwards, as it was voluntary, could not vary the nature of the case.

Demurrer allowed.

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against
St. John.

[*] PENGREE *against* JONAS.

(No entry on this occasion.)

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Lincoln's Inn
Hall, 1st Seal
before Hilary
15 Jan.

THE plaintiffs commenced an action against the defendants in the Common Pleas; the *capias* was returnable on the morrow of *All Souls*, and in *Michaelmas* 1785 they declared, and in *Easter* 1786 signed, an interlocutory judgment, sued out a writ of enquiry, and obtained final judgment in *Trinity* term, for 86*l.* 10*s.* damages. The defendants brought a writ of error in B. R. the 29th of *June* last. No farther proceedings were had; and the plaintiffs not having sued out any original writ to warrant the judgment, and the time being expired for applying for it, the plaintiffs, on the 10th of *November* last, preferred their petition to the *Master of the Rolls*, praying that the *Cursitor* of the city of *London* (where the venue was laid) might be ordered to issue an original writ in the cause, returnable in the Common Pleas.

On the 29th of *November* the petition came on to be heard at the *Rolls*, when his Honor ordered the writ to issue, and that, in the mean time, all proceedings on the writ of error should be stayed. (1)

At the hearing of the petition, Mr. *Worthington*, the defendant's solicitor, was in Court. (2) After the hearing of the petition, but before the order made in consequence of it was served upon him, *Worthington* signed judgment in the writ of error. (2)

Mr. *Mansfield* (for the plaintiffs) — now moved, that the judgment signed upon the writ of error, and the subsequent proceedings might be set aside, with costs, and also with the costs of this application to be paid by *Worthington*, and that he might stand committed for signing the judgment in contempt of the order of the Court.

He stated the proceedings, and particularly with respect to the contempt, that the defendant's solicitor attended the hearing of the petition, and heard the order made upon it, and had also seen the minute of it in the minute book; so that, although the order was not drawn up or served, he was guilty of a contempt in [*] proceeding after the order

Judgment in error for want of an original writ (there having been a petition, and order at the *Rolls* for one to issue, but the order not served,) the defendants ordered to consent to set it aside: but a commitment for contempt in entering it up refused.

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(1) Reg. Lib. 1786. B. fol. 33. b.

(2) If the report is accurate, Lord *Thurlow* seems to have made much too light of what certainly was a contempt of the Court, even under the admission of the party's counsel: and Lord *Eldon* C. rescued the authority of the Court from such attempts in future in *Osborne v. Tennant*, 14 Ves. 136.; where his Lordship held a party to have committed a contempt and breach of an injunction; he being present in Court during the motion, though absent when the order was pronounced.

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FENGREE
against
JONAS.

that further proceedings should be stayed; and for this he cited *Skip v. Harwood*, 3 Atk. 564, where *Harwood*, having been present in Court when the decree was pronounced, was committed for a contempt of it, although the decree was not drawn up; [*Powell v. Tollett*,] also 3 Atk. 567. where Lord *Hardwicke* declared, that when a defendant or his attorney have been present on an order for an injunction, and have proceeded at law before it has been sealed, the Court has considered it as a contempt, and committed the person for it. (3) With respect to setting aside the judgment, that must be done here; for there being no irregularity in the judgment itself, an application to the court of law to set it aside would be fruitless.

Mr. *Hollist*, for the defendants and *Worthington*. — The original writ being sued out after the writ of error brought, is a fraud upon government, as, if the plaintiffs can, at any time, come by petition to the *Rolls*, and have an original writ allowed, the writ will never be sued in the first instance, and government will be deprived of the stamp duties. In the present case, the petition did not pray that the proceedings might be stayed, and it was not understood to be part of the order, so that he was only proceeding in the ordinary course of justice. If the judgment ought not to stand, Mr. *Worthington* has only been mistaken; he did not intend any contempt of the Court, and is willing to rectify the mistake by any means in his power.

Lord *Chancellor*. — If it was a new question whether an original writ should be granted to support a judgment, I think the argument would apply; but it is too late to say now that such a writ shall not be granted. In this case, after the order was made, there was a neglect in drawing up and serving it. I do not see how I can make an order to set aside a judgment of the Court of King's Bench; but as the judgment ought to be set aside, they may consent to a motion to be made in the King's Bench for that purpose.

With respect to the contempt, I do not much like the case from *Atkyns*. (4)

Order, that the defendant should consent to a motion to set aside the judgment.

(3) S. P. also per Lord *Eldon* C. *Osborne v. Tennant*, 14 Ves. 136.

(4) If this sentence be correct, the Profession should have had a communication of his Lordship's reasons. Lord *Hartwicke* and Lord *Eldon*'s decisions seem much preferable.

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[*] HILARY TERM,

27 Geo. 3. 1787.

NEWMAN against WALLIS and Another.

(No entry.)

Plea that the
plaintiff is not
heir (was held
in this case, and
in *Gun v. Prior*, 2 Dick. 657. 1 Cox, 197. and Forr. Exch. Rep. 88. note,) a bad plea; [but Lord *Thurlow* afterwards altered his opinion.] (1)

THE bill set forth, that *Caleb Cotesworth*, M.D. seised of freehold and copyhold estates, by will dated the 30th of November 1724,

(1) See note (1) in the next page.

devised

devised the same to *Susannah* his wife, her heirs and assigns for ever, and died, without revoking his said will, the 16th June 1741; *Susannah* the wife survived him about eleven hours, and died intestate. The plaintiff claimed the estates as heir at law of *Susannah*, stating that at the time of her decease *John Newman*, his father, was her heir, who died in 1758, leaving *William* the plaintiff's elder brother, his heir, who died without issue and intestate in 1781, by which the title devolved upon him, the plaintiff; and in order to shew that his father was heir at law to *Susannah Cotesworth*, he set forth the pedigree thus; — that he was son and heir at law of *William Newman*, who was eldest son of *Thomas Newman*, who was the eldest son of *Henry Newman*, the brother of *John Newman*, who was father of another *Henry Newman*, who was the father of *Susannah Cotesworth*; and the plaintiff in his bill charged that the defendants claimed as purchasers, for a valuable consideration, of *Sarah James*, whom they pretend to be the heir at law of *Susannah Cotesworth*, whom the bill charged to be a supposititious child, imposed as the daughter of *William Malthus*, son of *Thomas Malthus*, and *Susannah* his wife, which *Susannah* was the only daughter and heir of one *Dormer Newman*, the uncle of *Susannah Cotesworth*, viz. her father's brother, when in fact *Sarah James* was not the daughter of *William Malthus*, nor any ways the heir at law of, or related to *Susannah Cotesworth*. And [*] the bill went into a detail of the means by which *Sarah James* was imposed and substituted by a *Francis Carter* and his wife as the child of *William Malthus*. To this bill the defendants pleaded, "that *Sarah James* was the heir at law of *Susannah Cotesworth*, without this that plaintiff ever was or is the heir at law to the said *Susannah Cotesworth*, in manner and form as by said bill alleged, all which, &c. defendants do aver and plead in bar of the said bill, &c."

The plea being set down to be argued, came on at *Lincoln's Inn Hall*, the 16th of January 1787.

Mr. Madocks and *Mr. Scott*, for the defendants, in support of the plea. — Although this is in the negative, it is a good plea. Not administrator is negative, but has been held good, 1 Vern. 473. According to *Pract. Register*, [826], a plea may shew that the plaintiff is not such a person as is alleged, as feme sole, heir, executor, or administrator; so a purchaser admitting his purchase says it is without notice of the plaintiff's equity. In the present case, the plea that the plaintiff is not heir, is the only defence the defendant can have to avoid the discovery. The plaintiff may reply, and then the matter will come in issue, whether the plaintiff is heir or not; if he is not heir, he will have no claim to the discovery.

Mr. Selwyn, for the plaintiff. — This is a bill for a discovery, brought by the plaintiff as heir at law to *Susannah Cotesworth*, the devisee of her husband, and the plea is stated to be a plea in bar. It is bad in form; for all these pleas which go to the person of the plaintiff are pleas in abatement, not in bar: it would be the first time such a plea ever was allowed. A denial of the facts contained in the bill is matter of answer, not of plea. Here, though there is not a denial of all the facts in the bill, it is a denial of some of them. The bill proceeds upon the ground that *Sarah James* was a supposititious child; it states that *Wallis* pretends that she was the heir of *Susannah Cotesworth*, and traverses that; but a

(1) See *Hall v. Noyes*, *postea*, 3 vol. 489. Lord *Eldon* C., alluding to the principal case, and to *Gun v. Prior* (above referred to in *margin*), observed, that "the original opinion was, that a negative plea was bad, and there ought to be an affirmative plea stating who was heir;" and that "Lord *Thurlow* afterwards changed his opinion, on the ground that the defendant, although he could prove that the plaintiff was not heir, might not be able to prove who was heir." In *Jones v. Davis*, 16 Ves. 264, 265. See also *Mr. Beames' Elements of Pleas in Equity*, from p. 120. *passim*.

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plea must not only traverse facts contained in the bill, it must state a new case out of the bill. A plea of purchase for a valuable consideration does this; it states that there was no notice of the plaintiff's equity; here it only denies what is stated in the bill. A plea that the [*] plaintiff is not heir has never been allowed. There was a case of *Gun v. Prior* (2) before your Lordship, the 16th of December 1785, where, to a bill of the like kind with this, there was a plea in bar that the plaintiff was not a relation, or of kin to the person under whom she claimed. Your Lordship was of opinion, that being a mere negative plea, it could not be allowed. A plea of not administrator is a mere plea in abatement; it is only that the plaintiff has not as yet obtained letters of administration; but the present is a mere negative plea, and ought not to be allowed.

Lord Chancellor. — This plea, if it is any thing, is a plea in abatement, wherein you traverse the plaintiff's right; as, where you plead that he has never administered. A plea in bar is collateral to the bill: a plea in abatement is a traverse; you never traverse in a plea in bar. The difference between this and the plea of purchase for a valuable consideration is this, that in that case the plea introduces what is *dehors* the bill; but this plea does not admit the facts of the bill. The plea must admit the subsequent facts of the bill, suppose the first fact objected by the plea is proved. The question is singly, whether the Court will admit a traverse of the plaintiff's title as *heir*, as a plea in abatement to the bill, or whether the equity of the Court entitles you to a discovery of all the defendant knows of the title. You deny the title which he must have in order to claim, which he cannot do unless he be such; then the question is, whether the plaintiff has or has not a right to have a discovery of your knowledge of his relationship to the person last seised.

Mr. Madocks (in reply). — If the bill related to proofs in the possession of the defendants, the plaintiff would be entitled to the discovery; so it would be of facts in the knowledge of the defendants; but neither of these is the nature of this bill. Unless the bill be clear as to the discovery required, there is nothing to argue from it. In the present case, no ejectment has been brought. What remedy can any man have but this of a plea, against any pretended heir who may come for a discovery, but that he should be obliged first to shew himself to be heir? In the case cited, there were facts stated in the bill which ought to have been answered.

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[*] Lord Chancellor. — The single question is, whether a plea that the plaintiff is not heir, is a plea in abatement. If the nature of a plea be whatever will go in destruction of the plaintiff's title (as, for instance, for an account) it is much to be wished that the plaintiff's title should in every case be established before he has the discovery; it would be a service to justice; but these pleas have a limitation, and it never has been done. In the Practical Register, *Not heir* is reckoned among the pleas in abatement: it is a good book, and seldom mentions any thing, even so slightly as it does this, without authority: but no instance is produced where such a plea has been admitted. The defendant never can be admitted to traverse that the plaintiff was heir, but he must swear to all the particulars which amount to shew him not to be heir. As in the case of a purchaser for valuable consideration, if the bill charge particulars of notice, the defendant must deny all the circumstances particularly, not generally deny notice; so where the title of heir is set up,

(2) 2 Dick. 657. 1 Cox, 197. and Forrester's Exch. Rep. 88. note, which last report is from Lord Redersdale's notes.

it must also be denied. Let it stand over till the second day of term, and in the mean time consider two points, 1. Whether you can plead that the plaintiff is not heir as a disability; — 2dly, Whether you can do so without answering all the particulars by which he makes himself heir. I should think there must be a number of cases, where the plaintiff's title must be by heirship; and yet it appears never to have been pleaded in this way. The reason given in Vernon for the plea of not administrator being good, does not hold here, for this is no plea at law. If the pedigree be ever so long, you cannot say the plaintiff is not heir, without going through the particulars of his title.

Upon the cause coming on again in term, Mr. Madocks cited *Fitzherbert's* and *Brooke's Abridgements*, title *Detinue*, to prove that in detinue of *Charters* as heir, bastardy, which in case of heirship is a plea in bar, is a good plea, where heirship is traversed, *Booth's Real Actions*, 111; which shews that the character in which the plaintiff brings his suit may be traversed. Although by analogy to pleas at law, pleas of this nature are called pleas in abatement in this court, yet, taking the term strictly, there can be no plea in abatement here; for pleas in abatement strictly called such, are pleas to the writ, but in equity there can be no plea to the writ, though there may be pleas in the nature of pleas in abatement. Then its being in the negative is no [*] objection; a negative plea may be good, 1 Vern. 473. If the defendant makes his defence by way of plea, the whole of the bill must be taken to be true, except the part denied by the plea. — Pleas in bar certainly go upon a different principle from pleas in abatement.

Lord Chancellor. — I have considered the question a good deal, and am clearly of opinion, that a party cannot by a plea of this nature, prevent the plaintiff from having satisfaction from him on the point required. Though the word *heir* is found in the Practical Register, there is not a single instance in all the books of such a plea. I have no comprehension how an objection can be maintained, in this shape, so as to save an answer. The plaintiff's title to sue is part of his case, which he must make out at the hearing in the same manner as all other points, and, if he fail, the consequence will be the same. But if a defendant could, in general, protect himself by such a plea, yet in this case, it would be impossible, where the sole object of the bill is the discovery, whether the plaintiff is not heir. The plea, therefore, must be over-ruled.

Mr. Madocks, mentioned a case of amending a plea.

Lord Chancellor. — With respect to any amendment of the plea, though certainly there have been cases in which the Court has permitted pleas to be amended, where there has been an evident slip or mistake, and the material ground of defence seemed to be sufficient, yet the Court always expects to be told precisely what the amendment is to be, and how the slip happened, before they allow the amendment to take place. This plea appears to me not only to be bad as it stands, but that it is impossible to form a plea that will save an account. (3)

Plea over-ruled.

(3) But see *Hall v. Noyes*, post. vol. 3. p. 483.; what Lord Thurlow there said respecting this case in p. 489.; and see the references in the preceding notes.

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against
WALLIS.

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Lincoln's Inn
Hall, 24 Feb.

A. by settlement after marriage, (not being indebted,) conveys to trustees to family uses, reserving a power to sell, but covenanting that the purchase-money should be paid to the trustees to be laid out to the same uses. He sells to *B.* who has notice of the covenant, but pays his money to *A.* who dies insolvent. *B.*'s representatives shall not be obliged to repay the money: the settlement being voluntary and fraudulent, as against a purchaser. (1)

[*] EVELYN against TEMPLAR.

(No Entry.)

THIS was a bill by children claiming under a settlement for the application of purchase-money.

By settlement, dated the 17th and 18th of November, 1792, and made on the marriage of the plaintiff's grandfather and grandmother, the plaintiff's father became entitled to an estate-tail in the premises which occasioned this suit. In 1761, the plaintiff's father, *Charles Evelyn*, by settlement after marriage, conveyed the premises to trustees to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to trustees to pay an annuity to his wife for her life, remainder to trustees for a term to raise 4000*l.* for younger children, remainder to his first and other sons. In the settlement was a proviso: That it should be lawful to *Charles Evelyn*, by deed executed in the presence of three witnesses, to revoke the uses, and to sell the estate; but he covenanted that the money to be raised by the sale of the lands should be paid to the trustees, to be by them laid out at the request of the parties, in the purchase of lands to be settled to the same uses; and in the meantime to be placed out on securities to the same uses. *Charles Evelyn* was not indebted at the time of the settlement.† The bill also stated a covenant on the part of *Charles Evelyn*, in 1766, to levy a fine to such uses as he should declare, otherwise to enure to the uses in the settlement, and a fine levied in Michaelmas term, in that year, and also a recovery suffered; and farther stated that *James Templar*, senior, now deceased, purchased the settled premises of *Charles Evelyn*, and paid the purchase-money to him, that he had notice of the settlement and covenant, and insisted that he ought to have paid the purchase-money to the trustees, not to *Charles Evelyn*.

Charles Evelyn afterwards died insolvent, leaving a widow, a son, and other younger children, who are the plaintiffs. Since the purchase *James Templar* is also dead, having by his will devised the estate to *James Templar* the younger, one of the [*] defendants, for life, with remainder over to his first and other sons. And the bill prayed, that the defendants, his representatives, might repay the money to the trustees to the uses of the settlement.

The defendants insist, that the deeds of 1761, being made after marriage, were voluntary and fraudulent, as against *James Templar* deceased, claim the benefit of the Statute 27 Eliz. and also insist, that the wife had barred her dower by the fine.

Mr. Madocks and Mr. Scott for the plaintiffs. — The prayer of the bill is, to be paid the purchase-money out of the assets of *Templar*, who had notice, that any money paid for the estate should be paid to the trustees,

† This circumstance, though stated, is immaterial as to settlements void against purchasers under 27 Eliz. Lord Hardwicke drew this distinction between the 15 Eliz. which respects creditors, and the 27 respecting purchasers, in *Lord Townsend v. Windham*, 2 Vesey, 10, 11. [See also *Chapman v. Every*, Cowper, 278.]

(1) *S. P. Pulbertoft v. Pulbertoft*, 18 Ves. 84. and *Buckle v. Mitchell*, ib. 100. And notice of such a voluntary settlement was also held immaterial in *Tonkins v. Ennis*, 1 Eq. Ca. Abr. 334. pl. 6. and *Buckle v. Mitchell*, 18 Ves. 100. See also per Lord Eldon C. on the principal case as to this point, 18 Ves. 112.

tees, not to *Evelyn*, who having full possession of the estate as tenant in tail, had made a settlement of it, for a provision for his wife and family. It is admitted he could make a good title to the estate and sell it; but by the covenant he has agreed that the money shall be applied to certain uses, which varies this from the common rule, and will cloath the money with the same uses as the land was, as against a purchaser with notice of the covenant, which *Templar* was, the covenant appearing in the abstract of the title, and he was advised that, notwithstanding it, the title was good. If *Evelyn* had been seised in fee, and had covenanted with a trustee, that, if he should sell, the money should be paid to the trustee, that would bind a purchaser with notice; and, in this case, having notice that the settlement was a settlement of the money as well as of the land, the payment to *Evelyn*, was a misapplication.

Mr. *Scott* referred to a case of *Leach v. Dean*, 1 Ch. Rep. 78. (2)

But the Lord Chancellor said, that, although it would have been as well, at first, if the voluntary covenant had not been thought so little of; yet the rule was such, and so many estates stand upon it that it cannot be shaken.

Dismissed the bill.

(2) See per Lord Eldon C. in *Pulvertoft v. Same*, 18 Ves. 91. and in *Buckle v. Mitchell* *ibid.* 100. 112, 113.

1787.

EVELYN
against
TEMPLAR.

ALDRIDGE against THOMPSON.

(No Entry.)

Lincoln's Inn
Hall, 22 Feb.

THIS was a bill of interpleader, filed by the lessees of Lord *Inchiquin*, against several sets of annuitants, who had distrained for rent on the plaintiff's farms, praying that they might interplead among themselves. The rents which had accrued were paid into Court.

[*] It was referred to the Master to settle the priorities among the annuitants.

The only question was with respect to the plaintiff's costs, whether they should receive them out of the rents paid in, or await the event of the suit, and recover then against the parties who should appear, ultimately, to be wrong in the interpleader.

And for the defendant it was urged, that, in a similar case, his Honor had determined, that, wherever there were two legal rights, and the parties were ordered to interplead, the plaintiff in interpleader, must take his costs against the party who was wrong in the interpleader.

Lord Chancellor.—The tenants ought at all events to have their costs, and, there being a fund in Court, to be sure of them out of that fund. Nothing can be more clear, as the idea of a bill of interpleader presumes in the plaintiff a right paramount the interpleader, The party calling upon others to interplead is in the situation of a stakeholder.

Ordered the plaintiff's costs out of the rents in Court.

(1) See *Dunsey v. Angore*, 2 Ves. jun. 304. 307. *Coutan v. Williams*, 9 Ves. 107. and *Angell v. Hadlen*, 16 Ves. 202. 204. and 2 *Merivale*, 169. *Burnett v. Anderson*, 1 *Merivale*, 405. *Morgan v. Marsack*, 2 *Merivale*, 107.

Tenants filing a
bill of inter-
pleader (1)
against an-
nuitants, and
bringing rents
into court, paid
their costs out
of the rents.

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1787:

[Vide S. C.
1 Cox, 333.]
Lincoln's Inn
Hall, 5 March,
1787.

Master of the
Rolls for Lord
Chancellor.

A conveyance
obtained from
persons unin-
formed of their
rights (1) set
aside, though
there was no
actual fraud or
imposition. (1)

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EVANS *against* LLEWELLYN.

(Reg. Lib. 1786. A. fol. 579.)

A BILL to set aside a conveyance by the two plaintiffs to the defendant, for fraud and imposition.

The sister of the defendants being seised in tail, of a gavel-kind estate, (to one moiety of which her husband would be entitled by the curtesy, so long as he continued unmarried, according to the special custom,) made her will, by which she devised the same to the defendant in fee; but not having suffered a recovery to bar the entail, the estate, subject to the husband's estate as aforesaid, descended to the plaintiffs, as heirs in gavel-kind. The defendant, who appeared to have been a friend to the family, aware of the devise being bad, but not of the nature of gavel-kind estates, thought the lands had descended to the elder [*] brother, a poor journeyman in some laborious trade, as heir at law, and, with his solicitor, sent to him a message, that two gentlemen wanted to speak with him, at an inn, in the town where he lived. Upon the man's coming, they gave him liquor, but it did not appear in evidence to be to the degree of intoxication, and then represented to him that his sister, in consequence of the obligations of herself and the family to the defendant, had, by will given the defendant the estate; that he was in treaty to sell it, but that the purchaser would not complete the purchase without his (the plaintiff's) joining, as heir at law, in the conveyance; and offered him 200*l.* to induce him so to do; but did not mention to him that the devise was void, or the value of the estate, which was about 70*l.* a year, but persuaded him, it was matter of duty in him to affirm his sister's devise. To this the plaintiff consented, and entered into an article to join in the conveyance. Prior to the payment of the money, the defendant discovered that the lands being gavel-kind, had descended to the two brothers, as customary heirs, and called upon the elder brother, to procure the younger to join in the conveyance, which he did, and the 200*l.* was equally divided between them.

The circumstance of the devise being void, and the value of the estate coming afterwards to the knowledge of the plaintiffs, they filed the present bill to set aside the conveyance, and to be admitted into possession of the estate.

Mr. Price stated the case as it appeared in evidence, and as now stated, and argued that the concealment and other circumstances amounted to fraud.

Mr. Mansfield (for the defendant) palliated the circumstances, and repelled the inference; but on neither side was any case cited.

His Honor observed (2), that no case had been cited (3), that, therefore, the case before the court must stand upon its own circumstances, which were such, as did not, in his opinion, amount to a proof of fraud and imposition. That if the plaintiff, after the offer, had gone home and

(1) *S. P. Bingham v. Bingham*, 1 Ves. 126. (Reg. Lib. 1748. A. fol. 154.) As to which, see the circumstances in Supplement to Vesey, sen. 79. S. P. also *Cocking v. Pratt*, 1 Ves. 400. and Supplement 176, &c. and *Ramsden v. Hilton*, 2 Ves. 304. and Supplement, 350.

(2) See the judgment more at length 1 Cox, 339. from whence it appears that the circumstances of this case in behalf of the defendant, were much relied upon by his Honor in his extenuation; and that they induced the mild decision which took place. If the previous cases referred to by note (1) had been examined and cited, the defendant might have been made to pay the costs.

(3) See, however, the cases referred to by note (1).

consulted his friends, and had afterwards accepted it, and joined in the conveyance, he thought he ought not to be relieved; but from its being suddenly accepted, [*] without further enquiry or information, the conveyance ought to be set aside (4) as *improvidently* entered into, and therefore decreed for the plaintiffs.

(4) "As having been obtained from and executed by the plaintiffs *T. E. and J. E.* *improvidently*," but no costs on either side. Reg. Lib.

1787.

EVANS
against
LLEWELLYN.

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TWEDDEL against TWEDDEL.

(Reg. Lib. 1786. B. fol. 334.)

THE plaintiff [being dissatisfied with] the decision by which the demurrer in this case had been allowed (*vide ante*, p. 101), it was set down to be re-argued. The petition of [re-hearing] stated a mortgage upon an estate called *Mount Haseldine*, (now in the possession of the plaintiff, *Francis Tweddel*) upon which 75*l.* was due to the testator, *John Aynesley*, as part of his personal estate. The remainder of the case was precisely as before stated.

Mr. *Madocks* and Mr. *Lloyd* again argued for the plaintiffs. They admitted the sole question to be, whether the personal estate of *John Aynesley* ought to be applied in exoneration of the *High-Laws* estate, towards the discharge of the mortgage to *Devalal* upon that estate, which amounted to the question, whether it was the personal debt of *John Aynesley*, so as to charge him personally.

Mr. *Madocks* argued the question principally upon the ground of intention shewn by the covenant, and by the clause of *John Aynesley's* will; — Mr. *Lloyd* on the nature of the transaction itself, reinforced by the other ground of express intention under the will.

With respect to the nature of the transaction, it was argued, that in ordinary cases, where a man makes a contract for the purchase of an estate which is in mortgage, he pledges his personal estate for the money due upon the estate. If the covenant is made with the mortgagee, and the mortgagee conveys to the purchaser, it becomes his debt, and he is personally bound to discharge it; and even though the contract be not made with the mortgagee, but with the mortgagor, yet the mortgagee may [*] take the benefit of the contract in this court, it not being necessary that he should be a party to the contract in order to his being a creditor by it. Suppose the mortgagor to become totally insolvent, or a bankrupt, his assignees would have a right at law, upon the contract, to come upon the purchaser; then would not the mortgagee be entitled to come immediately here, at least by a bill, to make use of the assignee's name, in order to recover against him, and why should he not recover against the purchaser in the first instance? The entering into the covenant makes him personally liable. *Belvidere v. Lord Rochford*, 6 Brown's Parl. Cases, 520. where it was decreed that the personal estate should be liable, applies perfectly to the present case.

With respect to the intention, all these cases are cases where the parties claim from the same person, and the court is to arrange the funds between them; it therefore depends upon the intention of the party which fund shall be applied. In *Lacam v. Mertins*, 1 Vesey, 312, which was upon marshalling assets, it was said the specialty creditor must be the creditor of the person whose assets were to be marshalled; and that

Lincoln's Inn
Hall, 13 March.

[*Vide* S. C.
ante, 101. 108.]

A. purchases an estate in mortgage and covenants with the mortgagor to discharge the mortgage; the personal estate shall not exonerate the estate charged with this debt. (1)

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(1) *Vide* S. C. *ante*, 101. 108. and the notes.

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TWEDDEL
against
TWEDDEL.

the 2000*l.* there, being the debt of the husband, was not the wife's debt, because it was not her intent to make it so, and she had entered into no covenant, she was therefore not liable for a breach; the mere recital of the debt not being sufficient to make a specialty, where the deed was sealed for another purpose. In cases where the party receives the money, it becomes his own debt; so, though he does not receive it, if he means to make it his own, as in *Cope v. Cope*, 2 Salk. 449. where the case is put that *A.* mortgages to *B.* for 500*l.*, and afterwards sells to *C.* for 1000*l.* If *C.* pays 500*l.* to *A.*, he remains personally liable for the remaining 500*l.*, which is this very case. The cases which were cited upon the former argument, of *Bagot v. Oughton*, and *Evelyn v. Evelyn*, do not apply. In *Bagot v. Oughton*, the estate was the wife's; the husband barely joined in the covenant on assigning the mortgage, and was to have no benefit; he therefore could not be bound. So of the son in *Evelyn v. Evelyn*; he was not benefited, but merely joined in the covenant.

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But here the party has expressly treated it as his debt; he has described it as such in his will, and taken it upon himself, and [*] has charged it upon the whole of his real estate. Suppose the *High-Laws* estate to be sold for the payment of this debt, and to prove insufficient, the other estates must be applied, but the personal estate must first make up the deficiency, if sufficient. If a part is to be thrown on the personalty, the whole should.

Lord Chancellor, during the argument, threw out his opinion, that in this case *William* covenanted with *Delaval*; that *John's* covenant with *William* only made him a surety for *William*, and not by any means liable to *Delaval*; but that if *William* should be sued by *Delaval*, then that *John* would be liable over. The covenant amounted to no more than if *William* had sold to *John* by lease and release, covenanting that the estate was free from incumbrances except the mortgage, then if *William* was sued by *Delaval*, he would have a remedy over against *John*; so that the case struck him as a less case than *Evelyn v. Evelyn*.

At the close of the argument, his Lordship expressed himself to this effect:

This appears to be the common case, where a man buys an equity of redemption. The question is, whether he becomes personally liable to the mortgagee. The buyer takes it subject to the charge; but the debt, as to him, is a real, not a personal debt. His contract with the mortgagee is only that the debt shall not fall upon him; it is a mere contract of indemnity, and he would be bound, without any specific contract, to indemnify him, as long as he can pay the money.

His Lordship affirmed the former order, allowing the demurrer.

[*155]

DANIEL against SKIPWITH.

Lincoln's Inn
Hall, March 13.

(Reg. Lib. 1786. A. fol. 274.)

Mortgagee may
prayer a sale of
the mortgaged
premises in the
first instance,
where the heir
deficient. (1)

FRANCIS JOHN SKIPWITH, deceased, by deed of lease and release, dated the 19th and 20th of April, 1779, mortgaged the premises

and personal representative are the same person, and the personal estate is clearly

(1) Lord Redesdale's notes refer to a case of *Hodgson v. Parker*, 26 July, 1791. Bill by mortgagee in fee against the personal representative, and the heir, for payment of mortgage

mises in question, said to be of the value of 1300*l.* *per annum*, to the plaintiff in fee, conditioned to be redeemable on payment of 17000*l.* In October 1781, *Skipwith* died, leaving the defendant his brother and heir at law, who also took out letters of administration, and all the interest due on the mortgage was paid down to 1784.

In 1785 the plaintiff filed his bill against the defendant, praying an account of the principal and interest due on the mortgage, and praying a sale; and in case the mortgaged premises should not produce sufficient to pay the principal and interest due, that the deficiency might be made up out of the personal estate; and in case the defendant should not admit assets, that there might be an account of the personal estate. In the bill he stated the bond and mortgage, and that the personal estate was deficient. The defendant, by his answer, admitted the personal estate was very small, and would be deficient; and the cause coming on before his Honor, the 6th of May last, he ordered according to the prayer of the bill.

From this decree the defendant appealed, because it had not ordered an account of the personal estate in the first instance, or that so much of the estate as should be necessary, only, should be sold. (2)

Mr. *Mansfield* and Mr. *Brown* argued that the decree was erroneous; the personal estate being the fund first liable, it should have been ordered to be first applied; that by this means the heir was put into a worse condition than in the common case, as the personal estate might be sufficient to discharge a part, though not the whole, and it might not be necessary to sell an estate of the value of 1300*l.* a-year to pay 17,000*l.*

But the Lord *Chancellor* thought the decree of course, the heir and personal representative being the same person, though, if they [*] had been different persons, it would have been necessary first to have an account of the personal estate. He thought the decree should have been alternatively by sale or mortgage, and to sell such part of the estate as should be necessary; but said, that would be matter of discretion before the Master; that his Honor went upon the idea that the whole was insufficient; that if the Master was convinced but half the estate was necessary, he would sell but half, but otherwise must put up the whole. His Lordship refused to vary the decree.

Affirmed.

mortgage debt out of the personal estate as far as it would extend, and the deficiency to be raised by sale of the mortgaged estate. — Decree accordingly.

It is, however, to be observed on this, that the decree was *on consent* of the heir, &c. Reg. Lib. 1790. A. fol. 602. b.

It appears to be the subsisting practice, (notwithstanding the doctrine in *Punket v. Penon*, 2 Atk. 51. and the decision of *Knight v. Knight*, 3 P. W. 331.) to allow a mortgagee to bring a suit against the heir, *without bringing the personal representative before the Court*. See Mr. P. Williams's note, 3 vol. 333 [A], and *per* Lord *Thurlow*, *postea*, 278, 279. in *Fell v. Brown*.

(2) "And that, in any case, the estate ought not to have been decreed to be sold, "without giving the petitioner an opportunity of redeeming the same." Reg. Lib.

1787.

DANIEL
against
SKIPWITH.

[*156]

1787.

Lincoln's Inn
Hall, 17th of
March.

LOWSON against COPELAND.

(Reg. Lib. 1786. B. fol. 362.)

Executor having 3 guineas per annum for collecting rents, a trustee as to the residue of personal estate.

And not having brought an action to recover a bond debt, was charged therewith. (3)

Having put the next of kin to prove their relationship, ordered to pay the costs of [taking the accounts. (4)]

[*157]

ANN BARBER made her will in 1765, and thereby (1) gave the defendant an annuity of three pounds (2) *per annum* for his trouble in receiving several rents of her real estate, and appointed him executor, making no disposition of the residue of her estate. In 1770, the plaintiffs filed their bill as next of kin of the testatrix, insisting that the gift of the annuity had turned the defendant into a trustee for them as to the undisposed surplus, and praying an account of all sums he had received, or might have received. The defendant, by his answer, contested the plaintiffs being next of kin, and put them to the proof of their relationship; and, in case they were such, controverted his being turned into a trustee for them. The cause was heard before his late Honor in 1773, who decreed that the defendant was a trustee for the next of kin, and referred it to the Master to enquire whether the plaintiffs were the next of kin, and to take an account. In 1783 the Master made his report that the plaintiffs were the next of kin; and, among other things, stated a bond, bearing date the 1st of May, 1761, by one *Lumley*, to the testatrix, for one hundred pounds, with which the Master charged the defendant. To this report the defendant excepted, for that the Master had charged him with the 100*l.* as received from *Lumley*, whereas he had not received it, although he had made various applications, and used due diligence to obtain payment of it. This exception coming on before the Lords Commissioners, [*] they referred it to the Master to enquire whether the executor had taken proper steps for the recovery of the money, and whether the debt was a good debt, and ordered the defendant to call in the bond. The Master reported, that the defendant had applied by an attorney to the obligor in the bond, to pay the debt, but had brought no action, or made any other application; and that it did not appear whether the debt was or was not recoverable.

It now came on again upon further directions.

Mr. *Ambler* and Mr. *Scott* (for the defendant) insisted that the report did not charge the defendant with such a neglect as ought to make him personally liable to answer the 100*l.* not got in from the bond debt — That the defendant had made many applications to the obligor; and although he had not brought any action, that arose only from the fear of an useless expence. — That the Master had reported it a doubtful debt,

(1) After a devise of her real estate to the defendant, his heirs, and assigns, upon certain trusts, and giving some legacies. Reg. Lib.

(2) "Three guineas and three shillings." Reg. Lib.

(3) See *Powell v. Evans*, 5 Ves. 839, 843, 844. *Tebbs v. Carpenter*, 1 Madd. Rep. 290, 298, &c. There is certainly a material distinction between executors permitting money to remain for any reasonable time on securities, where it was placed by their testator, and taking upon themselves to choose any personal security. The Court will not support them in the latter case, although the words of a will may imply a discretionary power as given to them; and the parties interested are entitled to have the assets invested in the 3 per cents., which are the securities of the Court. *Wilkes v. Steward*, and *Langston v. Ollivant*, Cooper's Ca. Ch. 6. 33. *Et vide per Lord Eldon* C. 8 Ves. 149, 150. which affords an answer to the question asked in *Orr v. Newton*, 2 Cox, 276. In the case of *Fletcher v. Walker*, where a testatrix had directed the surplus to be invested in real or government securities, till the parties who were to take attained 21, and the executor placed it at his banker's with money of his own, not thinking it worth while to make an investment, on account of the short time before one of the legatees would come of age, viz. 5 months; and the banker failed. The executor was held responsible. 3 Madd. Rep. 73.

(4) See R. L. and the last note to this case.

and

and the plaintiffs had never called upon him to bring any action; and he was the rather induced not to do so, as he considered himself as acting upon his own money, having no idea that the annuity of *3l. per annum* had turned him into a trustee, cases having been determined, that where a legacy is not given in such a way as to exclude the intention of giving the whole, it has been held not to turn the executor into a trustee, which he had been advised was the case with this annuity.

But Lord Chancellor ordered that he should be liable for this 100*l.* as having not been got in in consequence of his neglect.

Mr. Lloyd (for the plaintiffs) pressed that he might pay interest for the money admitted by the account to be in his hands, and all costs.

Lord Chancellor refused charging him with interest, but ordered him to pay the costs of establishing the next of kin. (5)

(5) Not so in Reg. Lib.; but "of so much of the suit as related to taking the accounts directed by the decree." Reg. Lib.

1787.

LOWSON
against
COPELAND.

[*] VANN against BARNETT.

(Reg. Lib. 1786. B. fol. 273. b.)

[*158]

Lincoln's Inn
Hall, 20 March
Master of the
Rolls for Lord
Chancellor.

MR. Scott moved, on the part of the plaintiff, for an injunction to restrain the defendant, to whom the plaintiff's estates had been conveyed in trust to pay debts by sale, &c. from selling, and that a Receiver might be appointed; upon very strong affidavits. The defendant's answer was not come in; but he having made an affidavit, in answer to those on the part of the plaintiff (2), his Honor took that to amount to an appearance, and granted the motion; and said, although a motion for a receiver before answer was unusual, yet, had it been necessary, he would have made a precedent. †

Motion for a
Receiver [in a
strong case of
waste] granted
before answer. (1)

[Mr. Mansfield for the defendant.]

† The Reporter is informed, this was not necessary, a motion for a Receiver before answer having been granted by Lord Bathurst, in *Compton v. Bearcroft*, Trin. 1773.

(1) See *Jervis v. White*, 6 Ves. 738, 739. *Middleton v. Dodswell*, 13 Ves. 266, 269. *Hugonin v. Basely*, *ibid.* 105, 107, 108. *Metcalfe v. Pulvertoft*, 1 Ves. & Beames, 180, 182. *Duckworth v. Trafford*, 18 Ves. 283.

(2) See 6 Ves. 739. 13 Ves. 269. *Brodie v. Barry*, 3 Meriv. 695. 1 Ves. & Bea. 182.

Ex parte KING.

(No entry.)

Lincoln's Inn
Hall, April 21.

BY a private act of parliament, 12 Geo. 3. certain estates of *William Halked*, Esq. were vested in trustees, to be sold to *James King*, Esq. and the purchase money was to be paid into the bank in the name of the accountant-general, until a purchaser should be approved of, and then to be invested in the purchase of other lands, to be settled to the same uses to which the lands to be sold had been limited, viz. to *Frances* the wife, for life, to her separate use; remainder to the use of *William Halked*, the husband, for life; remainder to the use of such one or more

Under a private act of parliament, money to be paid to certain parties upon petition to the Court; Lord Chancellor refused to make an order to pay the money to

persons deriving title from the original parties, and ordered them to file a bill.

1787.

Es parte
King.

[*159]

child or children of the marriage as they, or the survivor, should by writing direct; and, in the mean while, that the accountant-general should, upon a petition to be preferred to the Court for that purpose, in a summary way, place out the purchase money in the purchase of 3 per cent. consolidated annuities, and pay the dividends to such persons as would be entitled to the rents of the estates directed to be purchased. By an order of Court, made the 30th of November, 1778, it was ordered that [*] the money should be laid out, and that the interest should be paid to *Frances Halhed* (the first taker for life, under the settlement) for life, and until further order. The said *Frances Halhed* is dead, leaving issue by her husband *William Halhed*, *Nathaniel Brassey Halhed* (uninterested in this petition), the petitioner *Robert William Halhed*, *John Halhed*, and *Ellen Frances*, the wife of the petitioner *Edwin Martin*. Upon the marriage of *Edwin Martin* to *Ellen* his wife a settlement had been made, by which *William Halhed* and *Frances* his wife (by virtue of the power in the settlement and act of parliament reserved to them) appointed 3000*l.* of the purchased consolidated annuities, and such a proportion of the lands, to be purchased, as 3000*l.* of the annuities should, at the day of the decease of the survivor of them the said father and mother, bear to the whole purchase money, and a just proportion of the interest and dividends from the day of the death of the survivor, to be paid to the said *Ellen Frances Halhed* (now *Martin*) with covenants for assuring the same to *Edwin Martin*, in case the marriage should take place, in consideration of a competent settlement made on his part. And by indenture dated the 3d of May, 1782, between *William Halhed* and *Frances* his wife of the one part, and *Robert William Halhed* on the other part, reciting the settlement and act of parliament, *William Halhed* and *Frances* his wife, in consideration of love and affection, and by virtue of the power, appointed that, after the decease of the survivor of them, the residue of the stock purchased with the purchase money should be the property of, and belong to, the said *Robert William Halhed*, his heirs, executors, and administrators for ever. This latter the said *Robert William Halhed* had made the subject of a settlement, on his marriage with *Ellen Coswal*, the 4th of May, 1782, by which he assigned his share thereof to trustees, to the use of himself for life; remainder to the use of his wife for life; remainder to the children of the marriage. Upon the death of *Frances Halhed*, an order had been made, the 2d of April, 1784, for the payment of the interest of the money in the bank to *William Halhed* for life, or until the same should be laid out in a purchase; and *William Halhed* being now dead, *Edwin Martin*, and the trustees under *Robert William Halhed*'s settlement, together with *Robert William* himself, petitioned that the accountant-general might be directed to transfer 3000*l.* part of the consolidated annuities, to the petitioner [*] *Edwin Martin*, and 3972*l.* 17*s.* 11*d.* the residue, to the trustees in *Robert William*'s settlement, subject to the trusts thereof.

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Upon this petition coming on, the 23d of March last, the Lord Chancellor ordered it to be referred to the Master to see who was entitled to the interest due on the money in the bank, but afterwards directed the enquiry to be with respect to the principal as well as the interest; but the Registrar having taken only the first minute, refused to draw up any order as to the principal: the petition therefore came on again this day, when Mr. *Hollist*, for the petitioners, prayed a direction as to the principal as well as the interest. But

Lord Chancellor said, that, under the direction of the act of parliament, the Court could not go beyond the line drawn by the act itself. He could not go so far as he could in the exercise of the ordinary jurisdiction of the Court; for example, where a man has a life estate in fee, money, remainder to the heirs of his body, remainder to himself in fee,

as the man in this case, if the estate was in land, could obtain the absolute interest by levying a fine, the Court, in its ordinary jurisdiction, would order the money to be paid to him, though it would not where a recovery was necessary; (1) yet he should think the Court ought not to do this under a private act of parliament, but that the party should file a bill.

His Lordship therefore directed, that in this case the petitioners should file a short bill, and the other parties consent.

(1) The Profession will be aware of the alteration made, since that time, by Lord Eldon's act, 40 Geo 3. c.56.

1787.

Ex parte
King.

[*] *EASTER TERM,*

27 Geo. 3. 1787.

[*161]

BISHOP against CHICHESTER. [4th May.]

(Reg. Lib. 1786. A. fol. 774. b.)

THIS was a bill for tythes in kind. The defendants by their answers set up several moduses, the principal part of which were made the subject of issues directed to be tried at the assizes. As to one for the tythe of hay, the defendants set up a modus, and took issue upon it as such, but further insisted, that if it was not a modus, it was a composition, and could not be put an end to without due notice, and that the notice given here, being the 26th of July 1783, and the payment on the 10th of October, yearly, was not sufficient, and that if it was not good as a termination of the composition upon the next day of payment, neither was it so for the subsequent year.

As to this, which was the principal point,

Mr. *Mansfield* (for the plaintiff) contended, That notice never was held material, where the party insisted that it was a modus, not a composition real. Here they have insisted upon it as a modus, and gone into evidence to prove it as such, and then say, if it is not a modus, it is a composition.

Mr. *Scott* (for the defendants.) — In the case of *Kensington*, (*Adams v. Hewit*, in the House of Lords, 1782), the defendants insisted upon a composition binding during incumbency, and that if it was not so, it was a composition from year to year, and the notice not sufficient. The Court of *Exchequer* said, that, as the defendants put it upon a composition during incumbency, they could not afterwards put it upon the deficiency

The same notice must be given to determine a composition for tythes, as between landlord and tenant, and that, although the defendant sets up modus.

A modus of [3d.] (1) 5s. for a lamb was held so rank, that the Court would not send it to a jury. (2)

(1) The alleged modus was three-pence, and not three shillings, as stated in the other editions of these reports. Reg. Lib.

(2) The doctrine laid down by Lord Eldon C. in *O'Connor v. Cooke*, 6 Ves. 671. 8 Ves. 576, &c. seems more agreeable to long-established practice and the principles of law. His Lordship says, that "courts of equity, in ancient times, were more in the habit of taking to themselves the decision of questions of fact than they have thought wise and discreet in later times. All the Judges have demonstrated their opinion, to send the question of fact to a jury, where any reasonable doubt is raised; and I cannot suppose there is any prejudice in a tribunal appointed according to the constitution of the country to try the fact." "Rankness of a modus is a question of fact," "Upon the rankness of a modus, the quantum of the payment is not decisive, if immorally paid." See 8 Ves. 536, 539.

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BISHOP
against
CHICHESTER.

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of notice, disaffirming the contract they themselves first set up: by [*] the adverse claim they had disclaimed the necessity of notice; but the House of Lords gave so little attention to this point, that they referred it to the judges, merely upon the sufficiency of notice. (3)

Mr. *Mansfield* in reply.— The great question, in the present case, is upon the point of notice. It is taken for granted a notice was necessary, and then it is argued, that the notice given in this case is not sufficient. No case can be cited, that, where a party insists upon a *modus*, any notice is necessary. It is not like the case of landlord and tenant; but, even in that case; if the tenant contests the landlord's right, no notice is necessary. The Court of *Exchequer* have always considered it as unnecessary with respect to the termination of a composition. The *Kensington* case is cited against me. It is, true, that, in that case, the defendants insisted on a lease for the incumbent's life, if not, that there was not sufficient notice, to which they were entitled as lessees of their tythes. The incumbent insisted that no notice was necessary; that question did not enter much into the consideration of the judges, but their opinion was, that the notice was insufficient. But the difference between that case and the present is this, that there the defendants did not set up a title adverse to the plaintiff. Here they insist, that the clergyman has no right, that the church has parted with the tythes; it would be hard, that, after a long contest at a great expence, upon a different subject, the matter should turn round on notice, which could not be material in the case of a *modus*. The cases referred to in the *Kensington* case, were all cases of composition, and it was taken for granted, that six months notice was necessary, though notice was unnecessary in the case of a *modus*. *Rice v. Manning*, in the *Exchequer*, was a case of a composition, ending the 25th of December, yearly. On the 19th of December 1769, the incumbent gave notice that he would not abide by the composition for the next year, 1770, the court was of opinion, that the notice being before the expiration of the composition was sufficient.

Lord *Chancellor*.— That case is not law now. I remember a case before Lord *Mansfield*, where the notice was held to be analogous to that between landlord and tenant. But the *Kensington* case has settled the matter. (3)

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[*] Mr. *Mansfield*.— Then as to the notice applying to the succeeding year, this case is different from a notice to quit a farm. In that case it does not follow, from the landlord's wishing to have his farm at one time, that he will be willing to take it the next year; therefore, if he does not renew his notice, he is supposed to wave it; but in the case of the clergyman, the notice is, that in future, he will take his tythe in kind.

Lord *Chancellor*.— As to the point of notice, I cannot decide against the *Kensington* case. (3) In the case where the tenant controverts the right of the landlord, the defect of notice cannot be set up. The reason is, because the defendant controverts the right, out of which the notice arises. I thought the same rule had applied to tythes, and if the case did not seem to have decided otherwise, I should have thought, that where the defendant insisted on a contract inconsistent with that out of which the notice arises, he could not have set up the deficiency of notice: but I cannot distinguish this case from that; therefore, as to that matter the bill must be dismissed.

Among the other questions, the only one which received any decision was, whether *Ss.* (4) for a lamb, was a rank *modus*, and whether that question should be sent to a jury.

(3) *Vide Hewitt v. Adams*, 7 Bro. P. C. 64, octavo edition.

(4) It was three-pence, not three shillings. Reg. Lib.

Mr. Scott contended, that rankness of a modus was a question of fact, and ought as such, to be sent to a jury, and cited the case of *Gifford v. Webb*, in 4 Brown's Parl. Cases, 212, to shew, that the Court of *Exchequer* sent it to a jury, to determine, whether 3s. (4) for a lamb was rank; and he said this case differed, for it was both for the lamb and the wool.

Lord Chancellor. — The decision with respect to the rankness of a modus, will arise from the history of the subject. No one can look back into the history of the coinage, without seeing that 3s. (5) was greatly above the value of a lamb and its wool, within time of memory. If the modus is as much as the price of a lamb, there can be no necessity to send it to a jury, to try that which is an object of sense. It is true the rankness of a modus is a question of fact, but not such a one as to make it expedient to justice, that it should be sent to a jury to try it at a great expence. (5)

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(4) The alleged modus in *Gifford v. Webb* was also three-pence, not 3s. See 7 Bro. P. C. 15. 8vo. edition.

(5) See, however, the references in note (2), and *Gifford v. Webb*, above cited.

The alleged modus was three-pence for every lamb dropped, in lieu of the tythe of such lambs, and the tythe of the wool of such lambs. Per Lord Chancellor: — "Rankness is undoubtedly a question of fact; but the question is, whether the fact is sufficiently doubtful to make it expedient in point of justice to direct an issue; if it is not, the Court will not direct an issue to try it. The rankness of a modus depends upon the history of money, and there is no person so ignorant as not to know that 2s. 6d. is more than the price of a lamb in times long subsequent to the period of legal memory. Unquestionably, the modus here is too rank."

There were other moduses of 4s. per acre for land mowed for hay, and 2s. 6d. per acre for land on which corn or grain was reaped. Part of the lands were formerly open waste lands, and part of the forest of *Mendip*, and were enclosed by act of parliament, 15 Geo. 3.; and defendants, by their answer, insisted, that such customary payments in lieu of tythes of corn, grain, and hay, were parochial payments, and extended to all the lands, as well those which before the new inclosure lay open as to the old inclosures. On this point, *Moncaster v. Watson*, 3 Burr. 1375. was cited for the plaintiffs. But the Lord Chancellor was clearly of opinion, that where a modus is parochial, as in the present case, and not, as in *Moncaster v. Watson*, confined to a single farm, it extends to all the lands in the parish, as they may be from time to time employed in producing the species of crops subject to the modus. — From the notes of Sir S. Romilly.

It appears from Reg. Lib. that all the moduses were established by consent, except the modus of three-pence for a lamb, and the composition of two shillings and six-pence an acre for corn and grain. By like consent, those payments were accepted for the time past, and those tythes were to be paid in kind for the future. Reg. Lib. Editor.

[*] THOMPSON against HARRISON.

[*164]

(No Entry.)

GEORGE THOMPSON, living in town, employed his brother, John Thompson, to purchase an estate for him in the country, which he did in his own name, and part of the purchase-money was advanced by him, and no declaration of trust for the brother ever made. Afterwards, Jonathan Harrison, a nephew of the Thompsons, being about to marry with the other defendant, his wife, then Hannah Liddel, and wishing to make a settlement on her, proposed to John Thompson to settle the purchased estate, and to give him a security for the value. John Thompson, by letter, proposed this to George, who refused; but John nevertheless proceeded, and made a settlement of the estate on Jonathan Harrison for life, remainder to Hannah Liddel for life, remainder to Jonathan Harrison in fee, and took a bond from Harrison, for the supposed value of the estate; the settlement was prepared by one attorney, the security to John Thompson by another.

Plaintiff, having released the principal in a fraud, cannot go on against the other parties, though they would have been secondarily liable

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 THOMPSON
 against
 HARRISON.

George filed his bill against *John Thompson; Jonathan Harrison, and Liddel*; but, before the hearing, had released *John*, and examined him as a witness.

Lord Chancellor. — *John* being principal in the fraud, the decree must have been in the first place against him, although, in case of his insolvency, *Harrison* would be liable: but *George* having relinquished him, it is the same thing as if he had never been made a party, and, in that case, the plaintiff could not have gone on against the nephew, who would only be secondarily liable. Dismissed the bill.

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 [Vide S. C.
 1 Cox, 346.
 Decree affirmed
 postea, 519.]

A sum advanced upon the marriage of a putative daughter, not a satisfaction of a legacy, the parent having declared she would have more at his death. (1)

[*] DEBEZE against MANN. [2 May.]

(Reg. Lib. 1786. A. fol. 593. b.)

THIS was a legacy in the will of *William Macguire* to the wife of the bankrupt *More*, his putative daughter, in the following terms, "I bequeath the mortgage bond, 1365*l.* due to me from Mrs. *Manby*, to Miss *Kitty Meredith*, now in my house, in order to fit her out for *India*, or to dispose of her in marriage." Miss *Meredith*, during the testator's life, married *More* the bankrupt, and *Macguire* gave *More* a bond for 1000*l.* as a marriage portion. He also gave them, after marriage, 600*l.* to buy furniture, &c. The bond was afterwards paid; 400*l.* of it being retained by *More* out of money received on account of *Macguire* and the remaining 600*l.* upon suit by the assignees. *More*, the bankrupt's father, being examined as a witness, said, that *Macguire*, before the marriage, told him in a conversation on the subject, that "he could only give her 1000*l.* on her marriage, but there would be more hereafter, as his life was a bad one;" by which [the witness] understood that she would have a further fortune at the testator's death.

And the question was, whether the money advanced was an ademption of the legacy.

Mr. Attorney General, Mr. Mansfield, and Mr. Mitford, argued that it was an ademption.

The question is, whether the putative father has, by the act done in his life time, executed his will. A number of rules have, from time to time, been laid down on this subject. The general deduction from them is, that where a legacy is given to a person for a particular cause, as, for instance, for a portion, there an advancement of the sum is considered as an execution of the will; and a legacy given to a child is always considered as a portion. The rule is laid down in *Irod v. Hurst*, 2 Freeman, 224. If this person stood in the situation of a child, and the legacy was a general legacy, the payment of the money upon the marriage is an execution of the will. In *Shudal v. Jekyll*, 2 Atk. 516. Lord Hardwicke said, such an advancement, by a person standing in *loco parentis*, would be a satisfaction of the legacy. But in the present case, it is declared by the testator to be a portion, [*] which draws a line by which the court will be directed. The testator did not intend his putative daughter

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(1) When this decree was affirmed on the re-hearing, the Lord Chancellor said, he did not rest on the witness referring to the intention of the testator to do more at his death, but that he had not expressed any intention of satisfaction on the face of the gift. See postea, 521. Notwithstanding this, however, Lord Eldon C. says, it is clear Lord Thurlow, upon the above first hearing, did act upon such a declaration of intention. Vide in *Trimmer v. Dayne*, 7 Ves. 517, 518. See also *Robinson v. Whitley*, 9 Ves. 577. 580. Sir W. Grant, M. R., observes there, that the case before him was almost identically the same point with the principal case. See also 1 Ball. & Beatt. 303. and *Bilson v. Cookson*, post. 252. and 3 vol. 61.

any greater bounty than the legacy, and by marrying her in his life-time he executed that bounty. *Shudal v. Jekyll* turns upon the distinction between a general legacy and a legacy given for a particular purpose, which is always construed to be deemed by a performance of the general purpose. With respect to the parol-evidence, it is certain parol-evidence has been admitted in cases of this sort, notwithstanding Lord Talbot, in 3 Williams, 354, said, his opinion was against the admission of it, but when admitted it ought to be clear. This is very loose, and only speaks the understanding of the witness.

Lord Chancellor, — Indeed I think, when a man gives a legacy for a particular purpose, and afterwards advances money for the same purpose, it is too late, now, to say it is not a presumption that he meant to execute it, yet it is a presumption that often overturns the intention of the party. But in this case the evidence repels any presumption of that kind. He makes an apology for the smallness of the fortune he advanced with her, and says that he meant to give her more. He certainly did not mean to give her less than 1900*l.* and it does not appear that he did not intend, when his own occasions should not call for it, to give her a larger sum. The evidence is such, that the witness could not understand any thing but that which he swears he did understand, that the testator meant she should have more after his death. I therefore must take it that the thing which he did was not a full execution of what he intended; and if it was not so, it is out of the case.

The next question is, whether the 600*l.* was an execution of what he intended to do. It was not given as an advancement, but as a general gift, being after the marriage; but it does not correspond with the conversation, that after his death a part of his property would come to her as one of the objects of his bounty. There is no evidence or presumption, that the gift of 600*l.* to two married persons was an execution of a testamentary gift. The executrix must therefore give up the bond, in order that the money may be recovered and paid, subject to enquiries as to how it shall be settled with respect to the wife. (2)

(2) The Court declared, "that the bequest to *K. Meredith*, now the defendant *K. More*, by the will of the testator *W. M'Guire*, was a subsisting demand, and ought "to be assigned." And the mortgage was ordered to be assigned to the senior Six Clerk, &c. R. L.

[*] GEORGE HEATHCOTE, Esq. and Another, - - Plaintiffs. [*167]
MARY PAIGNON, and Others, - - - Defendants.
[May 5.]

(Reg. Lib. 1786. A. fol. 343.)

ON the 7th day of August, 1799, *John Paignon*, the defendant's late husband, lent to the plaintiff *Heathcote* the sum of 100*l.* and there-
An annuity being purchased for four years' purchase, on a life of 30, (subject alightly to the gout) set aside for inadequacy of price. (1)

(1) See *Vaughan v. Thomas*, 1 vol. 556. and *Gwynne v. Heaton*, *ibid.* page 1., and the references. Upon the principal case, and the point of inadequacy of price, see *Hoffman v. Cooke*, 5 Ves. 632. *Gibson v. Jeyes*, 6 Ves. 273, 274. *Low v. Barchard*, 8 Ves. 137. *Griffith v. Spratley*, stated post. 179. note, and lately reported 1 Cox, 383. 386, 387. 389, 390. *Ex parte Thistlewood*, 19 Ves. 247. It appears from those cases, that where there is no fraud, mere inadequacy of price is insufficient to rescind a bargain. See also *Stephens v. Bateman*, ante, 1 vol. 22.

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upon the plaintiff entered into a bond to him, in the penalty of 200*l.* to be void on payment of 100*l.* with interest. [A few days (2)] afterwards, *Paignon* agreed to purchase of the plaintiff *Heathcote* (being of the age of 30 years, but occasionally afflicted with the gout) an annuity of 50*l.* for the life of the said plaintiff *Heathcote*, for the sum of 200*l.* and paid him the purchase money for the said annuity; and thereupon the plaintiffs entered into and executed a bond, bearing date the 18th day of *August*, 1779, in the penalty of 400*l.* to be void on payment of 50*l.* a year during the life of the said plaintiff *Heathcote*. The plaintiff also executed a warrant of attorney to enter up judgment against them, and judgment was accordingly entered up. The plaintiff *Heathcote* also executed an indenture, whereby he assigned all his salary as a commissioner of the tax-office to *Paignon*, his executors, &c. during the life of the plaintiff *Heathcote*, as a further security for the annuity. On the 13th day of *January* 1781, *Paignon* died, having made his will, whereby he gave the said annuity to the defendant his wife for her life, and made the defendants *John* and *Richard Ramsbotham* his residuary legatees, and appointed them executors. The executors afterwards received of the plaintiff *Heathcote* the aforesaid bond debt of 100*l.* with all interest due thereon, and delivered up the security for the same. The plaintiff *Heathcote* paid the annuity of 50*l.* to *Paignon* in his life time, up to the 18th day of *November* 1780; and the same, since *Paignon's* decease, hath, from time to time, been paid to the widow, up to the 18th day of *February* 1782.

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In *April* 1782 the plaintiffs filed their bill against the widow, the said defendants *Isherwood*, *Richard* and *John Ramsbotham*, stating the above facts, and that it was agreed and understood between the plaintiffs and *Paignon*, that when the plaintiffs should be able to redeem the said annuity, and re-pay the said 200*l.* they should be at liberty so to do; but that *Paignon* did not [*] suffer the same to be inserted in the condition of the said bond; and that the plaintiffs had applied to the widow to permit them to redeem the same, on payment of the principal money, with interest at the rate of 5*l.* per cent. per annum, but she refused so to do, notwithstanding the plaintiff had tendered 102*l.* 2*s.* the balance of the principal sum of 200*l.* and legal interest due on the annuity bond. The bill therefore prayed, that on payment of what remained due on account of the said 200*l.* with lawful interest for the same, the plaintiff might be let in to redeem the annuity, and the defendants might be decreed to deliver up the said bond to be cancelled, and to acknowledge satisfaction on the record of the judgment, and might be restrained by injunction from taking out execution against the plaintiffs.

The defendants not answering within the time allowed, an injunction issued to restrain them from proceeding at law until answer and further order; afterwards the defendants put in their answer thereto, and the widow, by her answer, insisted that the plaintiffs ought not to be let in to redeem the said annuity.

On the 25d day of *November* 1784, the cause came on to be heard at the *Rolls*, before his Honor, who thereupon was pleased to refer it to the Master to enquire and state to the court what was the value of the said annuity of 50*l.* on the 18th day of *August* 1779, and also the market price of such an annuity [on that day]; in making of which enquiries the Master was [first] to take into consideration the state of health and circumstances of the plaintiff *Heathcote* at that time; [and for the second enquiry to take into consideration the age of the plaintiff at that time,] and the consideration of costs, and all further directions, were reserved

(2) The alterations in the text between brackets, are corrections made from the Registrar's Book by Lord Colchester.

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until after the said Master should have made his report. And the plaintiffs consenting to pay the sum of 137*l.* 10*s.* (3) it was ordered that they should pay the said sum into the bank, with the privity of the accountant-general, to be placed to the credit of this cause, and that the injunction should be continued until further order.

In pursuance of the order, the Master made his report, dated the 11th day of *July* 1785, and thereby certified that he found, by affidavits of persons who had known the plaintiff *Heathcote* several years, that the plaintiff was baptized *March* 2d, 1748, was in a very good state of health, and not subject to any disease [*] except the gout, and that only in a very slight degree; and the master also certified, that he found by the deposition of *William Morgan*, actuary to the *Equitable Society*, in the parish of *St. Ann, Black Fryars, London*, that *Paignon*, on the 18th day of *August*, 1779, caused an insurance to be made on the life of the complainant, *Heathcote*, in the office of the *Equitable Society*, in the said parish of *St. Ann, Black Fryars, London*, in the sum of 200*l.* for the term of seven years, and the annual premium paid on behalf of the said *John Paignon*, on that occasion, was 5*l.* 5*s.* 6*d.* — 10*s.* 6*d.* of which said premium, was an advance or increase of the premium, for insuring a person in a good state of health, on account of the complainant, *George Heathcote*, being subject to the gout, and also certified, that he found by the affidavit of *Robert Withy*, sworn the 29th day of *June*, then last, that he had been a stock-broker, near twenty years, last past, and during that time had been principally concerned in the buying and selling life annuities, and by that means became, and was well acquainted, with the value, and market price of such annuities: and that in and about the month of *August*, 1779, the market price of an annuity, secured by personal securities, for the life of a grantor, of the age of 30 years, or thereabouts, in a good state of health, was six years' purchase and no more; and that he never knew, or, to the best of his remembrance, heard of more than six years purchase being given for such an annuity, but that he had known and heard of such an annuity being sold or granted at five years' purchase, that he had perused office copies of the several depositions made in this cause, and was of opinion, that if the annuity in question had been brought to market on the 18th day of *August*, 1779, the same would not, under all the circumstances, taking into consideration the state of the health of the plaintiff *Heathcote*, and the security given for the payment of such annuity, have sold at the market, or even at a public auction for more than five years purchase; and the said Master also certified, that in order to ascertain the value of the said annuity in question, he had laid before *Mr. Charles Brand*, assistant to the *Register* to the *Amicable Society*, in *Serjeant's-Inn, Fleet-street, London*, (a person very conversant in the calculation of life annuities,) a state of the matters relating to the enquiry, as to the value of the said annuity, to the purport and effect following, (that is to say,) 1st, "What was the value of an annuity of 50*l.* per annum, granted on the 18th day of *August*, [*] 1779, by *Mr. Heathcote* considering the state of his health, described by the affidavit. 2d. What was the market price of such annuity, on that day granted by *Mr. Heathcote*, then 30 years of age. — *N. B.* The payment of which annuity *Mr. Heathcote* secured by the joint bond of himself and *Joseph Simpson*, (the other plaintiff,) and by a warrant of attorney, to confess judgment on the said bond, which judgment was accordingly entered up, as of *Trinity* term, 1779; and as a farther security, the said *George Heathcote* assigned over his salary of 500*l.* per annum, which he was entitled to, as one of the commissioners of the tax-office, which office he held during pleasure; but unless for misbehaviour, the com-

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(3) "Remaining due for the arrears of the said annuity." *Mr. Cor's* note.

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missioners are seldom or ever removed," and the Master also certified, that the said Mr. *Charles Brand*, (after having likewise perused the affidavit of the said Mr. *Withy*), attended the said Master in person, and certified, that he, (the said *Charles Brand*), was of opinion, that the value of an annuity for the life of Mr. *Heathcote*, as of the age of thirty years, was eleven years and six-tenths purchase, connected with the several circumstances in the affidavits before mentioned, and that there was no rule for governing the market price of such an annuity, but that he apprehended that, that ought wholly to be by the nature of the security to be given for the payment of it; and, that therefore, in the present case, he conceived, that an allowance of one year, and six-tenths of a year's purchase, would be a full compensation, for any risque which could affect Mr. *Paignon*, in the payment of the said annuity; and the Master further certified, that he did therefore conceive, from the circumstances and depositions above-mentioned, that the value of the annuity on the said 18th day of *August* 1779, ought to be computed at ten years purchase, which would amount to the sum of 500*l*.

On the 30th day of *November*, and the 3d day of *December* 1785, this cause came on to be heard before his Honor, for further directions:— When his Honor declared, he was of opinion, that *John Paignon*, deceased, the late purchaser of the annuity of 50*l*. a year, for the life of *George Heathcote*, for 200*l*. taking advantage of the said plaintiff's distress, purchased the same under the market price; (4) and that therefore such purchase ought to be set aside, and decreed the same accordingly; and referred it to the said Master, to compute interest, at the rate of 5*l*. per cent. per annum, on the said sum of 200*l*. advanced by *Paignon* to the plaintiff *Heathcote* for the purchase of the annuity, and all sums paid by *Paignon* for insurance of the plaintiff's life, [*] and of the costs of effecting such insurance, and all expences incurred by *Paignon*, on account of preparing the annuity deed, and to compute interest thereon, at the like rate, from the time of such respective payments; and also, of the several sums paid by the plaintiffs, or either of them, to *Paignon* in his life-time, and to the defendants since his death, on account of the said annuity; and it was ordered that the defendant be paid her costs, together with what should be found to remain due from the plaintiffs, for principal and interest on the accounts aforesaid, and that the defendants should deliver up to the plaintiffs, the indenture of assignment with the securities, and acknowledge satisfaction on the record of the judgment obtained on the bond. And, his Honor did not think fit to give costs, as to the rest of the suit, on either side.

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The defendant, the widow, conceiving herself aggrieved by the said decree, appealed to the Lord *Chancellor*, and the appeal came on in *Michaelmas* term last. It was argued then, and at several subsequent times, and received judgment in the present term.

Mr. *Scott*, Mr. *Graham*, and Mr. *Cooke* (for the appellants). — This is an appeal from the *Rolls*. The bill was filed, to be let in to redeem a bond and warrant of attorney, for securing an annuity. It stated that both the plaintiffs being in distress, applied to *Paignon*, for the loan of 200*l*. that he refused to lend it, unless upon the grant of an annuity; that they both objected to the terms, and that it was agreed that they should be let in to redeem, but that agreement was not made part of the bargain: but of these facts, though stated, there is no evidence. There is not a tittle of proof of any peculiar distress. (5) The only evidence is, that the plaintiff was about thirty, that he had no malady but the gout, and that the life was insured for about 5*l*. His Honor, in giving judgment in the cause, propounded two questions: 1st, What was the

(4) See the variation made in the decree *postea*, note (6), p. 179.

(5) The Master did not report any distress. R. L.

value of the annuity, under the circumstances of the case? 2d, What was the market price of such an annuity? — In the Master's report, he only recited the evidence given before him, but did not report an opinion. With respect to the market price; indeed, this is not properly the object of a market price. It is like a jewel, a horse, or a picture, and bears a price according to the opinion of the parties, the sale is therefore [*] not to be set aside without intrinsic marks of fraud; the value of such an annuity is much reduced, by its being for the life of another, and by the transaction being disreputable. But it was argued before the Master, that, being insured, it amounted to a certainty. But this not so; the precariousness of the insurer's security, which may fail, the reservations in the policy, as to quitting the bounds of *Europe*, the possibility of the party's destroying himself, &c. must be taken into consideration, and will very much reduce the value. Between the ages of thirty and forty, no man can get more than six years purchase for an annuity for his own life; if he has any malady, it will reduce the value to five years purchase. The inadequacy here, was as five to four, an inadequacy not sufficient to rescind the contract. Inadequacy of price can only be used as a mark of fraud and delusion; but here the plaintiff has precluded himself from complaining of delusion. He has only stated that he was to be admitted to redeem, and that that agreement was omitted in the contract. The bill expressly excludes delusion; for it states that both the plaintiffs saw the inadequacy, and chose to act under it. — Where there is no delusion, the mere distress of the party, (which in the present case was merely that of every imprudent man), or a mere inadequacy of price, will not rescind any personal contract, *Willis v. Jernegan*, 2 Atk. 251.; *Stanhope v. Cope*, 2 Atk. 231.; *Baldwin v. Rochford*, 1 Wils. 230. In the present case, it will be important to consider whether the court can interfere in such a contract, made with full knowledge: 1. Whether it is enabled by any precedent. 2. Whether it is so by any principle. The first case in the books, *Waller v. Dalt*, 1 Ch. Cases, 276, was the case of a young man employing a corrupt agent. Lord Nottingham relieved, on the ground of a gross cheat. — In *Barny v. Beak*, 2 Cha. Ca. 136. though very strongly circumstanced, the wines, &c. being merely a method to raise ready money upon a *post obit*, Lord North reversed the decree in favour of the plaintiff. The decree of reversal was reversed by Lord Jeffries in 1686. *Batty v. Lloyd*, 1 Vern. 141. intervened; there the Lord Keeper refused to set aside the bargain. In *Berny v. Pitt*, 2 Vern. 14. Lord Nottingham refused to relieve, though Lord Jeffries afterwards reversed the decree. *Twisleton v. Griffith*, 1 Williams, 310. was the case of a young man dealing for his [*] expectancies: both in that case, and *Berny v. Pitt*, the transactions were fraudulent.

The court has gone on a sound principle in setting aside transactions with heirs. The principle was expressly laid down in *Twisleton v. Griffith*; it had been acted upon in *Nott v. Hill*, 1 Vern. 167.; *Knott v. Johnson*, 2 Vern. 27. There are other cases which have proceeded upon other grounds than the cases of heirs, such as the Earl of *Ardglass v. Muschamp*, 1 Vern. 237., and Earl of *Ardglass v. Pitt*, *Ibid.* 239., which were both cases of gross fraud; *James v. Oades*, 2 Vern. 402., which was a clear colourable case of usury, and was the same point as arose in *Bosanquet v. Dashwood*, Forrester, 38. *Zouch v. Swain*, 1 Vern. 320., and *Herne v. Meeres*, 1 Vern. 465., both turned on gross fraud. In *Clarkson v. Hanway*, 2 Williams, 203., the weakness of the party was taken as a circumstance of fraud. In *Osmond v. Fitzroy*, 3 Williams, 129., the circumstances amounted to fraud. *Wiseman v. Beake*, 2 Vern. 121. shews that no great regard is paid to the age of the parties. In Sir Thomas Meers's case, cited Forrester, 40., it was to make interest principal; Lord Harcourt set

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aside the contract. In *Broadway's* case, cited also there, it was fraud arising from the circumstances: where a mortgage has been made at 5 per cent., but if the interest be not paid regularly, at 6 per cent. that has been relieved against, *Viner Mortgage*, 452., M.; though that has been explained by its being a penalty, yet I cannot see how it can be called so, since the case of *Rolfe v. Peterson* (6 Brown's Parl. Cases, 470). It is now not considered as a penalty, but as being liquidated damages. I shall make no observation on *Chesterfield v. Janssen*, or on *Gwynne v. Heaton*. *Bosanquet v. Dashwood* was upon usurious interest; the prayer of the bill was, that the usurious interest received might be allowed for. The defendants relied upon a *nisi prius* case of *Tomkins v. Barnett*, that the parties being in *pari delicto*, the plaintiff should not recover. This case has since been denied to be law, in *Jaques v. Golightly*, 2 Blackst. 1073. the *delictum* of the parties not being *par*. What is the result of these cases, in point of principle? 1st, That the court will effectually prevent and rescind the contract where it is usurious;—2dly, That it will do so in all cases of fraud: but it cannot be inferred from hence, that it will do so where there is no fraud;—3dly, In cases where a young man is dealing for his expectancies, [*] they will carry the principle to the extent of moral obligation; in other cases it cannot hold. Courts of equity have no jurisdiction to enforce common honesty; their jurisdiction is confined to cases where fraud is an ingredient. It will appear from the case of *Chesterfield v. Janssen*, 2 Ves. 125., what the court will treat as fraud. Lord Hardwicke, in giving judgment, considered four species of fraud:—1st, Actual fraud, arising from facts and circumstances of imposition;—2dly, Fraud apparent from the intrinsic nature and subject of the bargain itself, upon which he cited the case in 1 Lev. 111., (*James v. Morgan*); the Chief-Justice treated it as a gross imposition;—the third kind is that which may be presumed from the circumstances and condition of the persons contracting, established by the court in order to prevent surreptitious advantages of the weakness or necessity of another;—the fourth species is out of the present case. If the arrangement of Lord Hardwicke is to be looked to in the present case, it must be referred to the third species of fraud, that presumed from the circumstances and condition of the persons contracting. It is impossible that the court can look upon every common degree of weakness as sufficient to raise such a presumption. The mere making the bad bargain is not a proof of the necessity of the party. An annuity may be bought at any price, so it be not the cover of a loan. No act of parliament regulates the rate of interest to be made by the grantee. Money is left, as to this subject, to find its own value, *Richards v. Brown*, Cowp. 770.

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Cases of very urgent distress might be put, which would raise the presumption of imposition, but it must be a distress that destroys free agency. There is no evidence in this case of peculiar distress. So in cases of want of intellects, if the contract was such as no man in his senses could enter into, that might be sufficient to raise the presumption. But mere inadequacy of price, without these circumstances, is not sufficient. In the Roman Law Digest. l. 4. tit. 4. law 16. it is said, *In pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire*; but in the case of land, if the price was less than half, the sale might be rescinded, Cod. l. 4. tit. 44. l. 2. *Minus autem pretium videtur, si nec dimidia pars veri pretii soluta sit*. But its being void was in behalf of the seller only, not the buyer: the buying under half the value was the mark of fraud. In the present case there are no marks of fraud, no pretence that the value [*] was not as well known to the seller as the buyer. Your Lordship put the case of the annuity being secured upon real security, or that there had been a much greater inadequacy of price; if that had been

been the case, it might have been set aside from intrinsic evidence of fraud; but the inequality here is such as might take place in the common transactions of life, and undoubtedly no case has hitherto gone so far as the court is called upon to do in the present. If the inadequacy alone could be a ground, an issue might be directed to try whether it was such an inadequacy, which would be quite new, no such issue having ever been directed. With respect to the ratification of the contract, *Heathcote* paid the annuity during the life of *Paignon*, and down to the year 1782. There was a case at the *Cockpit* some time since, where the whole turned upon ratification, the circumstances being unchanged.

Lord Chancellor. — If the Court should take such a ground as to rest the case upon the market price, every transaction of this kind would come into a court of equity. If mere inadequacy is the ground, it should seem that it was scarcely sufficient; but there is a difference between that and evidence arising from inadequacy. *If there is such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to fraud. If the transaction be such as marks over-reaching on one side, and imbecility on the other, it puts the parties in such a situation, as to shew that it could not have taken place without superior powers on the one side over the other.* The business of a court of equity is certainly not so much to make people honest, as to obviate the inconveniences of dishonesty. Here is no evidence of distress, nothing but the inadequacy of the value; and if that could be made the rule, the least circumstance which varied the next case which occurred might make the difference.

Mr. *Stainsby* (for the trustees) said, — The *Gallican* church first invented these pecuniary contracts by giving annuities equal to double the rents for lands conveyed to the church — That the law has now put the purchasers of annuities under terms. In the year 1720, the legislature refused to annul the contracts made in *South Sea* stock; and in the case of *Cud v. Rutter*, 1 *Williams*, 570, [*] the Court would not set aside the contract. In *Carysfort v. Cartwright*, before Lord *Camden*, 1st July 1768, his Lordship thought Lord *Carysfort* bound. There was a case of Dr. *Collins*, where a bill was filed on account of the party having outlived the payment of principal and interest, but that was dismissed.

Mr. *Hollist* and Mr. *Stratford*, in support of the decree. — The circumstances shew the loan and the purchase of the annuity to be all one transaction. The application was for 300*l.* *Heathcote* obtained one by way of loan; the other *Paignon* would not advance without an annuity. The price given certainly was a very small one; and if inadequacy be a ground for setting any transaction aside, that, with the circumstance of *Paignon's* knowing that he could insure the life at one-tenth, where he makes a difference in the price of one-fifth, is a strong evidence of his taking advantage of the plaintiff.

The report is decisive as to the value, and the inequality of that to the price given must be inferred. The case of annuities is not the only one in which the Court has considered the market price as the medium for judging of the actual value of the subject before them. In *Mortimer v. Capper*, (*ante*, vol. i. p. 156.) it being suggested that the land was of greater value than the annuity given for it, there was a reference to the Master to enquire into the value. Inadequacy has been relied upon as the ground in many of these cases, as in *Gwynne v. Heaton*, *Ardglass v. Muschamp*, and *Ardglass v. Pitt*; so also in *Twisleton v. Griffiths*. *Herne v. Meeres*, 1 *Vern.* 465. is a very important case on this subject. As taken from the Register's book, it appears that the sale was at less than five years purchase. It was set aside, and Sir *Thomas Meeres* de-

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creed to be a mere mortgagee. † In the present case, the purchase was at considerably less than half the value.

[*] Long ago, it was an usual way of evading the statute of usury, to raise money by grants of annuities, upon a number of contingencies. In *Oddy v. Torlas*, 1 Vern. 352. and *Fawcett v. Bowers*, 2 Vern. 288. there must have been contingencies, or they would have been void at law. In *James v. Oades*, 2 Vern. 402.—40*l.* per annum, for eight years, for 200*l.* was set aside. Annuities at that time, had subsisted but a short time: they first began in Lord *Harcourt's* time. In *Stanhope v. Cope*, they were annuities at eight years purchase; upon a bill to redeem, Lord *Hardwicke* would have set the transaction aside; but the case was compromised. *Lawley v. Hooper*, 3 Atk. 278. goes the whole length of the present case. In Lord *Carysfort v. Cartwright*, Lord *Carysfort*, in 1763, being then 47 years old, sent for *Cartwright*, and proposed to him, to sell an annuity of 100*l.* for his own life, at six years purchase; *Cartwright* asked what was the security; Lord *Carysfort* proposed his estate, in *Ireland*. Afterwards, Lord *Carysfort* applied for double the sum. On the 19th of *December*, the deeds were executed, but the annuity was to take place from *July* preceding, when they bore date. *Cartwright* stopped two years annuity, as a security, and also 50*l.* for the expences, by Lord *Carysfort's* desire. There was also another grant, of an annuity of 100*l.* in which Lady *Carysfort* joined, as it was to affect her subsequent estate for life. The Court decreed, as between Lord *Carysfort* and *Cartwright*, the deeds should be set aside, and that *Cartwright* had taken advantage of his distress. — There Lord *Carysfort* was 47 years of age; his rent-charge was not worth above seven years purchase. In our case, *Heathcote* was only 30. — In *Barny v. Pitt*, the plaintiff [*] proceeded on practice, but none was proved. In *Stanhope v. Cope*, there were no circumstances to shew distress: as to confirmations by *Heathcote*, there was none, but payment of the annuity, whilst he was debtor on the bond for 100*l.*; as soon as that was paid off, he filed his bill. — The doctrine cited from the civil law, if it is at all material, makes in our favour, as, in this case, half the value has not been given. From the whole of the case, it must be manifest that the plaintiff was distressed, and, that *Paignon* took advantage of it, which was the motive which induced his Honor to make this decree, than which there never was one pronounced with more pointed decision; for his Honor said, he was perfectly satisfied that the plaintiff had been

† This case, as it appears in the Registrar's Book, is, that the *Cox* (father and son) being indebted to *Herne* by bond, dated the 27th *December*, 31 Car. 2. (1679), *Herne* sued them thereupon, and, they being abroad, about *Trinity* term 1684, filed his original writ for the purpose of proceeding to outlawry; but in *Michaelmas* term they appeared and pleaded, and in the term following he obtained separate verdicts, sued out elegits in *London*, and got possession of several houses in *London*. In the meanwhile *Cox* the younger, having an estate for life in several houses in *London*. (some of them comprised within the plaintiff's writs of elegit,) and in lands in *Yorkshire*, the inheritance of his mother, and having also by his marriage settlement (in which the defendant *Sir Thomas Meeres* was a trustee) an estate for life in lands in *Lincolnshire*, the inheritance of his wife, the value of the whole being about 800*l.* per annum, sold the same to *Sir Thomas Meeres*, at the price of 1480*l.* for the lands in *Lincolnshire* and *Yorkshire*, and 1500*l.* for the houses in *London*. The conveyance bore date the 31st of *October* 1684. The bill was for a discovery of all estates of the *Coxs*, and what money was due on the securities. The defendant, by his answer, insisted that he was a purchaser for a valuable consideration, *Cox* being a sickly life, without notice of plaintiff's claim. At the hearing, the plaintiff's counsel relied upon the inadequacy of the price paid; and by the decree the Lord Chancellor [*Jefferies*] declared, that the bargain made by *Sir Thomas Meeres* with *Cox, jun.* was not fairly obtained, in respect of the circumstances young *Cox* was in, but ought in conscience to be made void, the premises purchased by him being more than double the value of the money paid by him, therefore the defendant *Meeres* ought to be looked upon as a mortgagee, and gave directions accordingly.

grossly

grossly imposed upon, and had sold an annuity for four years purchase, for which an honest man would have given him ten, and even an usurer six; and, "that where there were principles, he was not in want of precedents; the case of young heirs had made a beginning; he was not afraid of adding men in distress to the list." The circumstance of men being in distress, has been a principle relied upon in many of the cases; it has been taken notice of in some cases at law. In the case of *Astley v. Reynolds*, 2 Strange, 915. with respect to goods pawned, the party, being in distress, was considered as incompetent to act; and Mr. Justice *Burnet* has made it one of the cases, in which the Court relieves, "where the bargain is so lucrative, and the person under necessity, so that the judgment of the Court has been, that necessity alone could induce him to make the contract, there has been relief."

Mr. *Scott* in reply. — In this case, a party, dealing throughout the whole transaction as for an annuity, now comes to pray it may be considered as a loan; so that, if *Heathcote* had died, *Paignon* must have lost his money, as an annuity; and if he survived, the transaction was to be cut down as a loan; this at least should have protected Mrs. *Paignon*, who takes this as devisee for life, and is an executrix, from the payment of costs. — I lay out of consideration, all the cases of young heirs and marriage brokerage bonds, where a public policy interferes; the parties in this case are not in any of those situations: the bill is not a bill to rescind the transaction, but to establish what it states to have been the actual contract, that they should be at liberty to redeem; the suggestion that it was a loan, therefore, cannot stand with the [*] allegation of the bill. It has been argued on the simple ground, whether there is, in the circumstances of the case, sufficient to enable a court of equity to set it aside. As to the case of the pledge, the ground on which it was decided, is different. It was in the hands of a person who was bound by law to restore it on payment of a certain sum; the action proceeded on a principle that it should not be lawful to him to vary those terms. The term "market price" certainly meant something which the Master of the *Rolls* thought certain. All the report proceeds upon is the opinion of third persons: if such opinions, given without oath, are to influence the judgment of the Court, property will be very uncertain. Although the value may be calculated at the sum stated, probably the annuity, at public auction, might not have brought five years purchase; this is the fact I wish to have ascertained, by way of coming at a market price, and, as to this, the report is so uncertain, that it ought to be referred back to the Master.

Lord *Chancellor*. — Where there has been a loan, and the terms have been such as to shew the distress of the party, the Court has given relief; here was 23 per cent. clear profit, with a certainty of the principal being secure.

The statute, and the determinations have encreased the market upon the bargainee. It would have been prudent at first, perhaps, to have stopped. Now if I declare, that having given but two-fifths of the value for the annuity, secured by the insurance, was taking advantage of his distress, that will be a proper preface to my affirming this decree, but that will decrease the future price of annuities. I cannot say, that being at all under the greatest price that could be obtained, would be a sufficient reason for rescinding the transaction. (6)

The decree was affirmed. † (6)

† A case has occurred since the above, of somewhat a similar nature, *Griffith v. Spratley*, in the *Exchequer*, 21st of June, 1787, which was as follows: "The plaintiff, in the year 1781, was entitled to two undivided third-parts of a ground-rent of 36*l.* per annum, arising out of lands in and near *Grub-street*, which had formerly been let upon a build-

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HEATHCOTE
against
PAIGNON.

[*179.]

[S. C. 1. Cox,
383.]

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HEATHCOTE
against
PAIGNON.

" a building lease, dated the 8th of November, 1731, for a term of sixty-one years, from
 " *Midsummer*, 1731, which will expire at *Midsummer*, 1792, with a covenant to renew
 " for twenty-one years, from the expiration of the former term, which latter term will
 " expire at *Midsummer*, 1813; and also, being entitled to two-thirds of the reversion
 " of the said premises. (subject to the term,) and the houses built thereon, in pursuance
 " of the said lease, which were in 1781, and continued to be in 1785, (when the de-
 " fendant's answer was sworn,) let to divers persons, at divers yearly rents, amounting
 " in the whole to 157*l.* but which rents were sworn, in the defendant's answer, to be
 " subject to deductions for repairs and land tax, which repairs were very great, there
 " being fourteen very old houses which will hardly stand the term of the lease, and
 " which are let at the utmost rent, being let to lodgers and inmates, some of whom pay
 " weekly rents, which are collected with great hazard, trouble, and expence. Two
 " of the houses were occupied by *Spratley*, the defendant, who was apprized by the
 " plaintiff of his being in distress, and of his intention to sell his interest in the pre-
 " mises. In 1784, the plaintiff and *Spratley* entered into an article, for the sale of the
 " plaintiff's interest in the premises to the defendant, for an annuity of 34*l.* a-year
 " for his life, charged on the premises, which was carried into execution, by in-
 " dentures, bearing date the 3d and 4th of December, 1784, whereby the premises were
 " conveyed to *Hill*, a trustee for the defendant *Spratley*, for a term of 200 years, for
 " securing an annuity of 34*l.* a-year to the plaintiff for life, and, subject to the term, to
 " *Spratley* in fee. The plaintiff *Griffith* paid 16*l.* for the expences of the conveyance.
 " *Spratley* the defendant, afterwards purchased the other third part of the ground-rent
 " and reversion, for which he gave 250*l.* The bill was filed by the plaintiff to set aside
 " the conveyance for fraud. In evidence was given a valuation of two surveyors, on
 " the part of the plaintiff, who valued the plaintiff's interest in the premises, — the one
 " at 86*9*l.* 8*s.* 8*d.** the other at 688*l.* and of two for the defendant, who valued the
 " same, the one at 447*l.* the other at 443*l.* 6*s.* 8*d.* The bill was dismissed without
 " costs, and the Lord Chief Baron (as the Reporter, who was not present, either at the
 " argument or judgment, has been informed,) gave as the principal reason for the de-
 " termination, that there was no case, where mere inadequacy of price, independent of
 " other circumstances, had been held sufficient to set aside a transaction: from whence
 " it may be presumed, that the case of *Herne v. Moeres*, as stated before from the Re-
 " gistrar's Book, where the Lord Chancellor's declaration seems to, entirely, turn on that
 " circumstance, had not been mentioned." [See the Report, 1 Cox, 383.]

(6) The following is the declaration of the Lord Chancellor, extracted from the Re-
 gister's Book, *Easter* term, 1787: —

" The decree to be varied, and, instead of the declaration in the decree, the following
 " declaration to be inserted: ' And Declare that it appears from the Master's Report
 " that the price paid by *J. P.* deceased, the late purchaser, was near two-thirds below the
 " real value (7) of the said annuity, and one-fifth below what appears to be the market
 " price; and therefore it appears that the said *J. P.* was taking advantage of the dis-
 " tress of the said plaintiff; and that such purchase ought to be set aside.' And it is
 " ordered, that the said decree be also varied, by adding after the words ' paid by the
 " said *John Paignon* for insurance of the said plaintiff's life,' the following words:
 " ' And also by the defendants under the engagements in the office of the Equitable
 " Society mentioned in the Master's report: And, with these variations, it is ordered
 " that the decree be affirmed.' Deposit to be paid back." Reg. Lib.

(7) See Lord Eldon C.'s observations as to the market price of an annuity being a fal-
 sible criterion, without clear evidence as to the real value, taking all circumstances into con-
 sideration, such as the general health of a party, &c. &c. 6 Ves. 273, 274, &c. 8 Ves.
 137. 19 Ves. 247, &c.

1787.

[*] CHURCH *against* EDWARDS. [15th May.]

(Reg. Lib. 1786. A. fol. 604. b.)

[*180]

*Master of the
Rolls for Lord
Chancellor.*

ettlement of the 29th and 30th of *July* 1702, on the marriage of *Bensalem Edwards* with *Hannah Saunders*, the estate in question tled to the use of *Bensalem Edwards* for life, remainder to *Hannah*, remainder to *the heirs of Hannah by Bensalem to be begotten*. Estate-tail descended upon *Hannah* and *Elizabeth*, the daughters of *riage*, upon whom also the remainder in fee descended, as heirs mother's brother.

ah, being in possession, levied a fine [of her interest in the pre- with proclamations, and filed a bill for partition. (1) The present by persons claiming under *Hannah* against persons claiming *Elizabeth*, to revive the proceedings under the former suit: &c. *Mr. Mansfield* and *Mr. Lloyd*, for the plaintiffs, insisted that *Hannah* fine, had obtained a fee in her moiety, and having afterwards it, there could be no objection to her devisee having a partition the representatives of *Elizabeth*.

Scott, for the defendants, contended that *Hannah* having a moiety state tail, the remainder to both sisters in fee, her fine would only moiety of that moiety, not a moiety of the entirety. If she had ised of a moiety in tail, with remainder to herself and a stranger her fine would clearly only have affected a moiety of the moiety; tion is only, whether the sister being interested in the estate-tail as in the remainder in fee, can make any difference.

er of the Rolls. — By the fine, *Hannah* obtained a base fee in that in which she had an estate-tail; how can you differ the moiety in ie had the estate-tail from that in which she had the remainder in would be rather curious to distinguish the one from the other, for pose of depriving her of the fee in the moiety in which she had the ail. The estate-tail is now spent, by the death of the sisters, and the n is fallen in. But, if the defendants think it worth arguing, I will ase to the Common Pleas, upon the question, "Whether *Hannah* under (2) the deeds of the 29th and 30th of *July* 1702, and by ine, acquired a fee simple in any, and what, parts of the estates d by those deeds."

question being argued in the Common Pleas, the Court had no ut that she acquired a fee-simple in a moiety.] (3)

which suit there was a decree accordingly. Reg. Lib. Under the fine and the indentures, dated the 19th and 20th *June*, 1770, the uses of the said fine, acquired a fee-simple or any other and what estate went, in any and what estate, comprised in the settlement, dated the 29th and *July*, 1702?" Reg. Lib. *Mr. Brown's MS. notes.*

Two sisters having estates-tail, descended from the mother, and the remainder in fee aliunde. One levies a fine: the question was, whether it barred the fee in a moiety, or only the estate-tail in one moiety, and the fee in a moiety of a moiety. [It was determined at law that it barred a moiety.]

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*Master of the
Rolls for Lord
Chancellor.*

After *cepi corpus*, the plaintiff cannot move that the sheriff may bring in the body, but for a messenger, and afterwards a serjeant at arms. (1)

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WILKINSON against BELSHER.

(No Entry.)

MR. *Hollist* moved, upon a *cepi corpus* returned, that the sheriff should bring in the body of the defendant, and cited 2 Atk. 507. and Pract. Regist. in Ch. [48], to prove that this was the practice of the Court.

[*] The *Master of the Rolls* saying he had never heard of such a practice, the usual proceeding being to move for a messenger, but that he would refer it at the plaintiff's expence;

Mr. *Hollist* moved for a serjeant at arms, the messenger having returned that he could not find the defendant.

(1) See Wyatt's Prac. Reg. 48. and 392. and *Miles v. Lingham*, 7 Ves. 250.

CULLEY against HICKLING.

(Reg. Lib. 1786. A. fol. 387.)

*Lincoln's Inn
Hall, May 24.*

After a verdict at law, and a bill filed for an injunction, which is obtained for want of the defendant's answer; the money shall be brought into court, or the injunction dissolved; but it must be on affidavits. (1)

THE present defendant *Hickling* brought an action in the King's Bench against the present plaintiff, for 500*l.* the penalty mentioned in a charter-party, which the plaintiff *Culley* had broken, by carrying a cargo of fruit from *St. Michael's*, one of the *Azores*, to the port of *London*, instead of *St. Petersburg*, whither it had been ordered by the defendant, and obtained a verdict for 500*l.*, and 4*l.* was awarded as damages or costs. The plaintiff filed this bill for an injunction, and the defendant, living abroad, did not put in his answer in time. An injunction was therefore obtained.

On the last day of the term, Mr. *Hollist* moved, on the part of the defendant, that the plaintiff should pay into the hands of the accountant-general, in trust in this cause, the sum recovered at law, otherwise that the injunction should be dissolved; and with respect to there not being any affidavit in support of the motion, he cited a case of *Wesket v. Carnevali*, the 9th of July 1774 †, where, the bill stating that a verdict had been

† *Wesket v. Carnevali*, in Chancery, the 9th of July 1774. — This was a bill filed against an Italian merchant, for an injunction after a verdict. A motion was made, that the plaintiff might pay into court the money recovered by the verdict, or that the injunction might be dissolved; and an order was made accordingly by Lord *Bathurst*.

The Order.

Whereas Mr. *Attorney General*, and Mr. *Hollist*, of counsel with the defendant, this day moved and offered divers reasons unto the Rt. Hon. the Lord High Chancellor of Great Britain, that the injunction issued in this cause, for stay of the defendant's proceedings at law, might be dissolved, in the presence of Mr. *Madocks*, of counsel with the plaintiff; whereupon, and upon hearing what was alleged by the counsel on both sides, his Lordship doth order, that upon the plaintiff's paying the sum of 22*l.* 10*s.* in a week from this time, into the Bank, with the privy of the Accountant-General of this Court, in trust in this cause, the said injunction be continued till the defendant shall have fully answered the plaintiff's bill, and the Court make other order to the contrary. And it is ordered that the said sum of 22*l.* 10*s.* when so paid into the Bank, be laid out in the name, with the privy of the Accountant-General, in the purchase of 3 per cent. annuities,

(1) *S. P. Acton v. Market*, ante, 14. and *Sherwood v. White*, 1 vol. 452. See also *Potts v. Butler*, 1 Cox, 330, 331. and *Cotes v. Lindsay*, 1 Dick. 352.

been obtained, [*] Lord *Bathurst* thought that sufficient, and ordered that the money recovered at law should be brought into Court, otherwise, the injunction to be dissolved without further order.

Mr. *Selwyn*, for the plaintiffs, said, *Wesket v. Carnevali* was the only case wherein such an order had been made but upon affidavit. In *Acton v. Market*, (*ante*, p. 14.) there could not be a doubt that the money was due. In *Coglan v. Regueneau* †, the [*] 10th of July 1780, there was an affidavit, contradicting the facts stated in the bill. In *Potts v. Butler*, in the Exchequer, the 1st of March last ‡, there was also a full affidavit.

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against
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nuities, in trust in this cause, and he is to declare the trusts thereof accordingly, subject to the further order of this court; and in default of the plaintiff's paying the said sum of 223*l.* 10*s.* into the Bank as aforesaid, by the time aforesaid, it is ordered that the said injunction be dissolved without further motion.

† *Coglan v. Regueneau* and another, in Chancery, the 10th of July 1780. — The defendants were Italian merchants, resident at *Leghorn*, and obtained a verdict against the plaintiff, for about 600*l.* in an action at law, to which the plaintiff had pleaded a set-off; which at the trial was admitted by the defendant's agents, so that the verdict was only for the difference, notwithstanding which the plaintiff now filed his bill, alleging that the defendant had received for his own use about 300*l.* for the purchase of two cargoes of fish sent by the plaintiff into the *Mediterranean*, and that the plaintiff being unable to prove this circumstance at law, the verdict had therefore been obtained by the defendants, although in fact the balance was really due from them to the plaintiff, and praying an injunction.

An injunction having been obtained for want of an answer, an application was now made to the Court on behalf of the defendants, that the plaintiff might pay the sum for which the defendants had obtained judgment at law, into court in a month, or that the injunction might be dissolved.

The motion was supported by affidavit, shewing the improbability of the case made by the bill, and particularly stating that the defendant's agents had admitted at the trial all that the plaintiff had offered by way of set-off.

The motion was originally made before the *Master of the Rolls*, on the 30th of June. He doubted of the propriety of the application, and the motion stood over. It was now made before the Lord Chancellor, and the case of *Wesket v. Carnevali* cited. — The Lord Chancellor observed, that bills of this nature, grounded on falsehood, were a disgrace to the justice of the nation. That the court of *Exchequer* had made a rule, requiring an affidavit in support of the case made by the bill, whenever an injunction was prayed, and the defendant was out of the kingdom. That this was a very unequal rule: it extended to *Scotland*, *Ireland*, *Calais*, and *Ostend*, places from which an answer could be obtained almost as soon as from a remote part of *England*; but he thought that upon a bill like the present, filed against merchants residing at *Leghorn*, it was highly proper for the Court to interfere, he therefore ordered the money to be paid into the Bank in a month, and, in default of payment, the injunction to be dissolved without further notice.

‡ *Potts v. Butler* and *Coward*, in the Exchequer, the 1st of March 1787. — Motion [S. C. 1 Cox, 330.] that the injunction obtained in this cause might be dissolved, or that the plaintiff might pay the sum of 603*l.* 10*s.* recovered at law into court.

On the 28th of May 1785, a charter-party was entered into between the plaintiff and the defendant *Butler*, whereby the plaintiff hired the ship called the *Arethusa*, and was to pay 195*l.* 10*s.* per month.

By the charter-party, *Butler* covenanted that the ship should be provided with all things fit and proper for such a ship and voyage, and should load and receive on board her as much goods and merchandize as could be stowed, leaving only room for passengers and provisions, and that the ship's company should use all diligence and dispatch in expediting the voyage.

The ship sailed on her voyage to *Jamaica*, the defendant *Coward* being the captain, and arrived at *Jamaica* about the 3d of August 1785. She sailed from *Jamaica* the end of January 1786, and arrived in *England* the 19th of April following.

Butler brought an action against the plaintiff, to recover the sum due upon the charter party; upon which the plaintiff filed this bill, alleging that the ship was not properly fitted out; that the captain delayed taking up a cargo unnecessarily, for the sake of getting more upon the charter party; that the ship was not properly stowed, and did not bring home a full cargo, which he might have obtained, and that the witnesses who could prove these facts lived in *Jamaica*, so that he could not defend himself at law if the action proceeded; and praying a discovery, and a commission to examine his witnesses abroad, and an injunction: without praying relief.

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davit. There is no [*] established practice to ground such an application, unless it is founded on affidavits. In many cases it might oblige a party to bring a sum of money into Court, where there was a balance due to him.

Lord Chancellor.— You are plaintiff in a case of equity. It is the practice of the Court of Exchequer, that, where a verdict has been obtained, the money shall be brought into Court; and it seems very reasonable, for a judgment obtained at law should not be set aside but upon fair grounds. If any specific charge was made by the bill, I think it would be necessary for both parties to make affidavits of the facts. If a man has obtained a judgment at law, and there are no equitable circumstances to render it unjust, he ought to have execution; but if equitable circumstances are stated in the bill, the money ought to be brought into Court to abide the event. But let it stand over for the parties to make affidavits.

At the seal after the term, the matter was mentioned again, upon an affidavit of the defendant *Hickling*, contradicting the circumstances alleged in the bill, and the motion was granted.

The defendant *Butler*, at the time of filing the bill, was gone on a voyage to *America*, as captain of a ship.

The plaintiff did not file his bill in time to obtain an injunction until after *Butler* had obtained interlocutory judgment in his action, and executed a writ of enquiry, on which he obtained 60*l.* 10*s.* damages, and costs; after which the plaintiff, upon an affidavit of the facts above stated, obtained an injunction.

Mr. Cooke now moved to dissolve that injunction. To shew that the Court of Chancery, in injunction bills, where the defendant was abroad, would enter into the merits before answer, he cited *Sherwood v. White*, *Acton v. Market*, *West v. Carnevali*, and *Coglan v. Regueneau*. Mr. Scott, who was present, also mentioned the case of *Mitchel v. Davis*. As to the merits, he stated the affidavits, containing a full answer to what was alleged on the part of the plaintiff.

Mr. Scofe (for the plaintiff) relied upon the practice of the court not to dissolve an injunction until coming in of the answer.

Lord Chief Baron said, — This was an intolerable grievance, long felt and complained of; that this Court had the credit of first applying a remedy to the evil, by requiring an affidavit of the merits; that the Court of Chancery having furnished them with an authority, he should be ready to comply with the motion, and to say that, upon a reasonable case being made, the fund should be brought into Court; and that the present did seem a reasonable case.

Hotham, Baron. — In general cases, it can be no inconvenience to adopt the rule of the Court of Chancery, and this is a reasonable case for so doing.

The money was ordered to be brought into Court within a month, (and, by consent, to be laid out in the funds,) otherwise the injunction to stand dissolved without further motion.

In *Mitchel v. Davis*, cited by Mr. Scott in the above case, there were affidavits; and the first being held insufficient, the defendant was obliged to file additional affidavits to entitle himself to his motion.

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Lincoln's Inn
Hall, May 25.[Fide S. C.
1 Cox, 359.]

Defendant
having de-
stroyed the sub-
ject of the suit,
dismiss his own

[*] KNOX against BROWN.

(Reg. Lib. 1786. A. fol. 460.)

ON the last day of the term, Mr. Cooke moved, on the part of the plaintiff, to dismiss his own bill without costs.

and absconding, shall find security for costs, otherwise the plaintiff shall be permitted to dismiss his own bill without costs. (1)

(1) This is an exception from the general rule, preventing a plaintiff from dismissing his own bill without costs, unless consented to by the defendant. *Fidèle v. Evans*, ante. 1 Vol. 267. Anon. 1 Ves. jun. 140. *Dison v. Parks*, id. 402.

The

The defendant, having taken a lease [from] the city [of some reservoirs of water], and the plaintiff being his security for the rent, it had been agreed between them, that the defendant should assign the lease to the plaintiff as a security. The plaintiff being damnified by being obliged to pay 100*l.* for arrears of rent, filled this bill for a specific performance of the agreement, by having the lease assigned. After the bill filed, the defendant surrendered the lease, and went off to *Scotland*. (1) Mr. *Cooke* argued, that the subject matter of the suit being thus gone by the act of the defendant, and he absconding, the plaintiff ought to be permitted to dismiss his bill without costs, and not be compelled to go on with a certainty of losing his costs; and said that there were cases where the courts of law would permit a plaintiff to discontinue without payment of costs, where he could not have the effect of his suit.

Lord *Chancellor*. — The defendant having destroyed the subject of the suit, and absconding, shall not put the plaintiff to dismiss his bill on payment of costs. He therefore ought to find security for payment of the costs, or the bill to be dismissed without costs.

His Lordship therefore directed Mr. *Cooke* to move it in this form, which he did at the seal after term, and the motion was granted. (2)

(1) The plaintiff conceived the suit had abated, until the 1st of *February* preceding; when he was informed that the defendant's solicitor had given a notice to dismiss his bill with costs. Reg. Lib.

(2) The order as drawn up was, that the plaintiff's bill should be dismissed without costs. Reg. Lib. and 1 Cox, 359.

1787.

Knox
against
Baowu.

[*] TRINITY TERM.

[*187.]

27 Geo. 3. 1787.

Between EDWARD LESLIE, eldest Son and Heir at Law, and also sole Executor and residuary Devisee and Legatee named in the last Will and Testament of JOYCE LESLIE, his late Mother deceased, who was the Grand Daughter and Heir at Law of JOYCE WARREN, the only Sister of EDWARD CHANDLER formerly Bishop of DURHAM; and the said EDWARD LESLIE is likewise Heir at Law of the said Bishop, and of THOMAS LYSTER, BARBARA FITZWILLIAM, CATHERINE WINDHAM, ANN BROTHERTON, and RICHARD CHANDLER (only Son of the said Bishop), and who took the Name of CAVENDISH, Plaintiff.

The Most Noble WILLIAM Duke of DEVONSHIRE, Heir at Law of ELIZABETH CAVENDISH deceased, who was the Widow and Devisee of all the real and personal Estates of the above-named RICHARD CAVENDISH;

The Right Honourable CHARLES Earl of CAMDEN, who, together with the Right Honourable Lord CHARLES CAVENDISH (since deceased), were the Executors named in the Will of the said ELIZABETH CAVENDISH, who was the sole Executrix, Devisee, and residuary Legatee of the said RICHARD CAVENDISH;

The Reverend RICHARD HUNTLEY, Clerk, Administrator *de bonis non* of ANN BROTHERTON, deceased, who by her Will appointed the said CATHERINE WINDHAM and BARBARA FITZWILLIAM Executors [*] thereof, which Will was proved by BARBARA only, and the said RICHARD HUNTLEY is also surviving Executor of CATHERINE WINDHAM, the sole Executrix of her Husband WADHAM WINDHAM, who,

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who, together with the said RICHARD CAVENDISH (whom he survived), were the Executors named in the Will of the said Bishop, the said RICHARD HUNTLEY is therefore the personal Representative of the said Bishop, ANN BROTHERTON, and CATHERINE WINDHAM; The Honourable JOHN FITZWILLIAM, Administrator with the Will annexed of BARBARA FITZWILLIAM, his late wife, deceased, and Devisee of all Sums she became or was entitled to under, the Settlement, (dated the 13th and 14th of November 1745,) or the Will of her Father the said Bishop;

MARY LYSTER, Widow of THOMAS LYSTER, deceased, WILLIAM LYSTER, and FRYDESWOOD HEARNE, Devisees of the real and personal Estate to which the said THOMAS LYSTER claimed to be entitled under the Settlement and Will of the said Lord Bishop of DURHAM, and others, - - - - - Defendants.

[18 May and June 11.]

Master of the
Rolls for Lord
Chancellor.

By Original, Amended, and Supplemental Bills and Bill of Revivor.

[*189]

(Reg. Lib. 1786. B. fol. 495.)

E. C. by deed conveyed several sums of money, secured by mortgages, amounting to 60,000*l.* to trustees in trust, to be laid out in the purchase of lands, to the use of himself for life, remainder, as to sums to the amount of 28,000*l.* to his wife for life, remainder to his son *R. C.* for life, with several remainders over, remainder to *J. L.* in fee; and as to sums amounting to 23,000*l.* to *R. C.* for life, with several intermediate remainders; remainder to *T. L.* in fee; and as to one particular mortgage of 8500*l.* and some leasehold estates to secure annuities; the surplus to *R. C.* in fee, with power of revocation. By his will he gave these leasehold estates, and the mortgage for 8500*l.* together with another mortgage of 6700*l.* in trust to secure the annuities; the surplus interest, or rents of the lands purchased, to be paid to *R. C.* for life, and to be settled in the same manner as his other estates:—1st. These mortgages are to be considered as real estate;—2dly. It being uncertain, which of the limitations they were to follow, they are undisposed of, and passed to *R. C.* as heir at law, and from him to his general devisee *E. C.* who having died intestate, as to real estate, they go to her heir at law the *D.*

THE original bill set forth, that *Edward*, then late Lord Bishop of *Durham*, being entitled, amongst other things, to several large sums of money, secured upon several mortgages, [*] taken in his own name and in the name of several other persons in trust for him, and possessed of leasehold estates therein mentioned, by indentures of lease and release, bearing date the 13th and 14th days of November 1745, the release being tripartite, and made between the said *Edward*, then late Lord Bishop of *Durham*, of the first part; the Reverend *Wadham Knatchbull*, Clerk, and *Robert Stillingfleet*, Clerk, of the second part; and Sir *Wyndham Knatchbull*, Bart. since deceased, and Sir *Hugh Briggs* and *Thomas Wyndham*, both since also deceased, of the third part; reciting that there was due to the said late Lord Bishop of *Durham*, from *Augustin Earle*, Esq. on mortgage to him of several manors, farms, and hereditaments in the county of *Norfolk*, the principal sum of 16,000*l.*; and that there was likewise due from Sir *Bryan Broughton*, Bart. to the said Lord Bishop, on a mortgage of the manor of *Leaton*, and other manors and farms in the county of *Nottingham*, the principal sum of 7000*l.*; and that there was also due to the said Lord Bishop, from the Right Hon. *George Earl of Cardigan*, on a mortgage of several lands in *Howley Park*, and elsewhere at and near *Wakefield*, in the county of *York*, the principal sum of 5000*l.*; and that, by indenture, bearing date the 15th day of November 1733, *Thomas Boothby* and *Sarah* his wife had conveyed an estate, called *Bradlow*, otherwise *Bradley Ash*, in the county of *Derby*, unto the said defendant *Wadham Wyndham*, in mortgage, as a security to him for a considerable sum of principal money; and that the said *Wadham Wyndham*, by deed tripartite, bearing date the 17th of November 1733, declared that 1500*l.* part of the principal money secured by the said last-mentioned mortgage, was the proper money of the said Lord Bishop of *Durham*; and reciting that there was due to the said

Lord

Lord Bishop of Durham, from the Right Hon. Margaret Countess of Coningsby, upon a mortgage of certain manors and lands in the county of Hertford, the principal sum of 18,187*l.* 18*s.* 6*d.*; and that there was due to the said Lord Bishop, from Dame Mary Burdel, the sum of 4000*l.* on a mortgage in fee of the manor and forest of Gisburn, in the county of York; and there was also due to the said Lord Bishop, from Thomas Boothby Scrimpsire, the sum of 8500*l.* secured by mortgage of the manor of Norbury, and other manors, farms, lands, and hereditaments in the county of Stafford; and also reciting, that the said late Lord Bishop was entitled to, and possessed of, four church leases, one being in his own name, of the [*] rectory of Towcester, in the county of Northampton, held under the Bishop of Litchfield, by indenture of lease, bearing date the 19th of April 1738, for three lives; the second lease in the names of the said Wadham Knatchbull and Robert Stillingfleet, but in trust for the said Bishop of Durham, of pasture ground in Salt Marsh in the manor of Howden, in the said county of York, by indenture of lease between the said Edward late Lord Bishop, and the said Wadham Knatchbull and Robert Stillingfleet, bearing date the 27th day of February, in the year 1737, for the lives of three of the children of the said Bishop; and the third and fourth of the said leases in the name of the said Robert Stillingfleet, of lands in the parish of Walsingham, and county of Durham, formerly granted to Robert Hemington and John Wise, for twenty-one years; he the said Lord Bishop, for the considerations therein mentioned, did grant, assign, transfer, and set over, unto the said Sir Wyndham Knatchbull, Sir Hugh Briggs, and Thomas Wyndham, their executors, administrators, and assigns, the said principal sums of 16,000*l.* 7000*l.* 5000*l.* 1500*l.* 18,187*l.* 18*s.* 6*d.* 4000*l.* and 8500*l.* making together 60,187*l.* 18*s.* 6*d.* and all interest to grow due for the same, and all his the said Lord Bishop's interest therein; and by the said indentures the said Lord Bishop did grant unto the said Sir Wyndham Knatchbull, Sir Hugh Briggs, and Thomas Wyndham, their executors, administrators, and assigns, all his right and title to the rectory of Towcester, and the lease thereof, during the demise thereof for three lives, and for and during the term of any future lease that should or might be taken of the same; and by the said indentures the said Lord Bishop, and the said Wadham Knatchbull and Robert Stillingfleet by the direction of the said Lord Bishop, assigned unto the said Sir Wyndham Knatchbull, Sir Hugh Briggs, and Thomas Wyndham, their executors, administrators, and assigns, all his and their right and title to the aforesaid pasture grounds in Skelton, and Salt Marsh aforesaid, during the term of their demise, and for and during the term of any future lease that should be taken of the same; and by the said indenture tripartite the said Lord Bishop, and the said Robert Stillingfleet by his directions, did grant unto the said Sir Wyndham Knatchbull, Sir Hugh Briggs, and Thomas Wyndham, their executors, administrators, and assigns, all his and their right and title to the said lands in Walsingham, and the two leases under which the same were held, for and during the term of their [*] demise, and for and during the term of any future lease that should or might be taken of the same: To hold the said sums, and all interest to grow due thereon, &c. and the leasehold premises therein contained, during the terms therein demised, upon trust, to permit the said Edward, then Lord Bishop of Durham, to receive and take as well the interest and produce of the said whole principal sum of 60,187*l.* 18*s.* 6*d.* as the profits of the said rectory of Towcester, otherwise Tocester, and other the premises, during his life or his own use, and from and after his decease, then upon trust, with the consent and direction of Barbara the wife of the said Bishop, if she should be then living, and, if not, then with the direction of the said

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Richard Chandler, and such of his the said Bishop's three daughters as should survive her, and the heirs of such survivor, testified in writing under his, her, or their hand or hands and seals, to get in the whole principal sum of 60,187*l.* 18*s.* 6*d.* and to lay out and dispose of the same, and every part thereof, in the purchase of freehold messuages, lands, tenements, or hereditaments, of an estate of inheritance in fee-simple in possession, and, with the like consent and direction as aforesaid, settle, convey, and assure to and in themselves as trustees, and their heirs, all such messuages, lands, tenements, or hereditaments, to be purchased as aforesaid, with their appurtenances, to such uses, and upon the trusts thereafter directed concerning the same, or as near thereto as might be, having regard to the equality of each one's portion, and as the death of the persons, and other contingencies, would admit of; (that is to say) as to the said sum of 16,000*l.* and the interest thereof, 7000*l.* and the interest thereof, and 5000*l.*, (making in the whole 28,000*l.* with the interest thereof,) to the use of the said *Barbara Chandler*, the wife of the said Bishop, and her assigns, for her life, and from and immediately after her decease, then to the use of the said *Richard Cavendish*, during his life, and, after the determination of that estate, to the said trustees and their heirs during his life, upon trust to support contingent remainders, with remainders to the first and other sons of the said *Richard Cavendish*, successively in tail male, with remainder to the daughter or daughters of the said Lord Bishop of Durham who should be then living, or, being dead, to their child or children then living, at the time of that contingency, and to the daughters of the said *Richard Chandler*, if there should be one, or if more than one living, lawfully begotten, then to [*] such daughter as the said *Richard Chandler* should under his hand appoint, the daughter or daughters of the said Lord Bishop to hold together with the daughter of the said *Richard Cavendish*, share and share alike, as tenants in common, and not as joint-tenants, for their sole use and benefit, notwithstanding their coverture, during their lives, with the like limitations to the said trustees and their heirs, during their lives, to preserve the contingent remainders, with remainders over to the several and respective heirs of the body of all and every such daughters of the said Lord Bishop, and of the daughter of the said *Richard Cavendish*, and in case such daughter of the said *Richard Cavendish*, or any of the daughters of the said Lord Bishop, should die without leaving any child or children of her or their bodies, then as to the shares of her or them so dying, to the survivor or survivors, and the respective heirs of the body and bodies of such survivor or survivors; and if there should be no child by any daughter of the said *Richard Cavendish*, or of the daughter or daughters of the said Lord Bishop, as aforesaid, then and in such case with remainder to *Thomas Lyster*, only son of *Anthony Lyster*, of *Lysterfield*, near *Athlone*, in the kingdom of Ireland, by the daughter of the only sister of the said Lord Bishop, *Joyce Lyster*, deceased, and to his heirs male, and for default of such heirs to *Joyce Leslie*, sister of the said *Thomas Lyster*, and wife of the Rev. *James Leslie*, and his heirs and assigns for ever: and as to the said sums of 1500*l.* and 18,187*l.* 18*s.* 6*d.* and 4000*l.* (amounting to 23,587*l.*) and all such messuages, lands, and tenements to be purchased therewith, from and immediately after the death of the said Lord Bishop, to the use of the said *Richard Cavendish* and his assigns, during his life, with a limitation to the said trustees and their heirs in trust, during his life, to preserve the contingent remainders, and immediately after his decease to the first and other sons of the said *Richard Cavendish*, successively in tail male, with remainders to the daughter and daughters of the said Lord Bishop, then living, or being dead, to their child or children, and to the daughter of the said *Richard Cavendish*, if there should be but one, and if more than one living, lawfully

fully begotten, then to such daughter as the said *Richard Cavendish*, should under his hand appoint, the daughter or daughters of the said Lord Bishop and their representatives to hold together with the daughter of the said *Richard Cavendish* share and share alike, as tenants in common, and not as joint tenants, for their sole use and benefit, notwithstanding their coverture, during their lives, with the [*] like limitations to the said trustees and their heirs, in trust during their lives to preserve contingent remainders, with remainder to the several and respective heirs of all and every the daughter and daughters of the said Lord Bishop, and of such daughter of the said *Richard Cavendish*, and in case such daughter of the said *Richard Cavendish*, or any of the daughters of the said Lord Bishop should die without leaving any child or children of her and their bodies, then as to the share of her and them so dying as aforesaid, to the survivors or survivor of the respective heirs of the body and bodies of such survivors or survivor, and upon default of children by any daughter of the said *Richard Cavendish*, or of the daughter or daughters of the said Lord Bishop as aforesaid, then and in such case, to the said *Sir Wyndham Knatchbull*, *Sir Hugh Briggs*, and *Thomas Wyndham*, their executors, administrators, and assigns, for the term of 200 years; upon trust, by and out of the interest of the said 60,187*l.* 18*s.* 6*d.* and the rents and profits of the messuages, lands, and hereditaments, to be purchased therewith, as therein directed, and so to them limited, to raise and pay, or cause to be raised and paid by mortgage, or sale of all or any part thereof, the sum of 8000*l.* to the said *Joyce Leslie*, for her sole use, if she should be then living, or such of the children of her body as should be then living after her decease, and from and immediately after the end or other determination of the said term of 200 years, to the use of the said *Thomas Lyster*, his heirs and assigns for ever: and as to the said sum of 8500*l.* and interest, and all such messuages, lands, and hereditaments to be purchased therewith, and the yearly rents and profits of the rectory of *Towcester*, and the two pasture grounds in *Skelton* and *Saltmarsh*, and the lands in *Walsingham*, upon trust, that they the said trustees, their heirs, executors, administrators and assigns, from and immediately after the death of the said Lord Bishop, should pay or cause to be paid all the interest, issues, rents, and profits thereof to his said daughters, and to the said *Richard Cavendish*, as therein appointed, (that is to say,) in the first place, to the said *Ann Brotherton*, the yearly sum of 200*l.* for her sole use and benefit, during her life, and to the said *Catherine Wyndham* and *Barbara Cavendish*, the clear yearly sum of 120*l.* each for their respective sole use during their lives, and as to and for the surplusage of the said interest-money, and the rents of the lands to be purchased therewith, and the rents and profits of the said four church leases, after payment of the said 200*l.* [*] 120*l.* and 120*l.* as therein before directed, upon the like trust, to the use of the said *Richard Cavendish*, during his life; and it was declared, that after the deaths of the said *Ann Brotherton*, and *Catherine Wyndham*, and *Barbara Cavendish*, their annuities so ceasing and determining as they happen to die, should sink into the surplusage for the use of the said *Richard Cavendish*, for his life, and as to the said principal sum of 8500*l.* after the expiration of the said annuities by the death of the said *Ann Brotherton*, *Catherine Wyndham*, and *Barbara Cavendish*, the said 8500*l.* and the lands to be purchased therewith as aforesaid, should be to the use of the said *Richard Cavendish*, and his heirs for ever. And as to the four church leases of *Towcester*, and the pasture lands in *Skelton* and *Saltmarsh*, and the lands in *Walsingham*, after the expiration of the said annuities as aforesaid, it was thereby declared, that the said *Sir Wyndham Knatchbull*, *Thomas Briggs*, and *Thomas Wyndham*, their executors, administrators, and assigns should stand seized thereof, in trust to the

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use of such child or children, of the body of the said *Ann Brotherton*, and *Catharine Wyndham*, and *Barbara Cavendish*, or either of them, as should be living at their deaths, and their heirs and assigns, and on failure of such children, to the heirs and assigns of the said *Richard Cavendish*, for the remainder of the terms in being, as aforesaid. Which said indenture tripartite contained a proviso that it should be lawful for the said Lord Bishop of *Durham*, from time to time, by deed or will, to revoke all or any of the uses therein mentioned, and to declare new or other uses at pleasure.

The said *Edward*, late Lord Bishop of *Durham*, afterwards made his will and testament in writing, bearing date the 28th day of *June*, 1750, and after reciting that by his said settlement of the 14th of *November* 1745, he had given his two small leases in *Walsingham*, he did by his will revoke that grant, and also revoked the grant, use, and trust of his mortgage on the estate of *Mr. Boothby* of *Tooley*, called *Bradlow*, or *Bradley Ash Grange*, in *Derbyshire*, in the name of the said *Wadham Wyndham*, bearing date the 15th of *November* 1733, and after further reciting that he had settled 200*l.* a-year on the said *Ann Brotherton* for her life, and 120*l.* a-year on the said *Catharine Wyndham* for her life, and 120*l.* a-year to the said *Barbara Cavendish* for her life, and appointed the yearly income of his two leases of *Towcester* rectory, and of the *Salt Marshes*, in the parish of *Howden*, (which were short of the sums laid on them,) in aid thereof, and [*] for securing the payment of their annuities, he thereby further gave to his said trustees, the aforesaid mortgage he had on the said *Mr. Boothby Scrimpsire's* estate, called *Norbury*, bearing date the 16th of *June* 1743, and his mortgage on *Sir Charles Tyrrell's* estate, called *Thornton*, in *Buckinghamshire*, dated the 18th of *June* 1747; and he further declared, that his will was, that out of the first annuity that should cease by the death of any of his the said testator's daughters, the sum of 80*l.* out of that first annuity should be assigned and paid to the said *Joyce Leslie*, to commence from the time of her widowhood, and to be continued for her life, in case she should survive her said husband; but said annuities being paid, he willed that the surplusage of the interest of those two mortgages, or of the rents of the lands to be purchased therewith, should be paid to the said *Richard Cavendish* for life, and to be settled in trust, after the manner, and under the same conditions, limitations, and restrictions, as his other estates were directed to be settled; and the said bishop appointed the said *Richard Cavendish*, and *Wadham Wyndham*, executors of his said will. The said Lord Bishop of *Durham*, on the 28th day of *June* 1750, made a codicil to his will, and thereby declared his will was, that the surplus of his personal estate should be divided between his said children *Richard Cavendish*, *Catherine Wyndham*, *Ann Brotherton*, and the said *Barbara Cavendish*, (afterwards *Barbara Fitzwilliam*,) and that the shares of the money that should come to them, should be for their sole use and benefit. The Bishop died on the 20th day of *July* 1750, without revoking or altering any of the trusts or uses created and limited in and by the said indenture tripartite, otherwise than in his said will. *Richard Cavendish* and *Wadham Wyndham* proved his will and codicil in the prerogative court of *Canterbury*; and the bill as amended stated, that *Barbara Chandler*, the wife of the said Bishop, died in the life-time of the said Bishop, and the said *Sir Wyndham Knatchbull* was also dead, whereby the trusts created in and by the said indenture tripartite and will, became vested in the said *Sir Hugh Briggs* and *Thomas Wyndham*, by survivorship, that the Bishop's daughters are all since dead without issue, leaving several of the defendants their personal representatives. That *Richard Chandler* married *Elizabeth Cavendish*, and died in 1769, without issue, having made his will, and thereby appointed his wife sole executrix

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atrix and devisee of his real and personal estate; that the plaintiff, [*] is heir at law to him and his sisters; that *Elizabeth Cavendish* widow of *Richard Cavendish*, made her will, and disposed of her personal estate, and made the defendant *Lord Camden* her executor, but made no disposition of her real estate; and that the defendant the Duke of *Devonshire* is her heir at law; that *Joyce Leslie*, the ultimate devisee of the money secured on the mortgagees, amounting to 28,000*l.* upon whom the same, all the intermediate uses being spent, devolved, is dead, and the plaintiff is her heir at law, sole executor, and residuary legatee and devisee; that *Thomas Lyster*, the ultimate devisee of the other mortgagees, the amount of 23,000*l.* is also dead without issue, and that the defendants *Mary Lyster* and *Frideswood Hearne* are devisees of his reversionary interest, and the plaintiff is her heir at law. The amended bill therefore prayed, among other things, that the several sums of money therein stated, being the produce of the said mortgages, particularly the sum of 141*l.* 10*s.* 5*d.* 3 *per cent.* Bank annuities, the produce of the sum of 100*l.* together with the sum of 7598*l.* the produce of the said sum of 1792*l.* (the sums secured on the mortgages) or such parts or shares therein as the plaintiff should appear to be entitled unto, might be paid, and the securities assigned to the plaintiff, and all proper parties join in the conveyance.

The cause came on to be heard in *Easter* term last, and was further argued in this present term.

Mr. *Mansfield* and Mr. *Scott*, for the plaintiff. — The prayer of the bill, that the former abated suit may be revived, and that several sums specified therein, and among them the sum of 9941*l.* 10*s.* 5*d.* 3 *per cent.* Bank annuities, being the produce of a sum of 8500*l.* and the sum of 598*l.* 6*s.* 11*d.* 3 *per cent.* Bank annuities, being the produce of 7792*l.* 0*s.* 6*d.* devised by *Edward Lord Bishop of Durham*, or such parts thereof, as the said plaintiff shall appear to be entitled unto, may be transferred to the plaintiff, and the settlements therein mentioned may be delivered up to him.

The question in the cause arises solely on the subject of these two sums. The 8500*l.* was due to the Bishop from *Thomas Boothby Scrimshire*, and secured by mortgage of the manor of *Norbury*; it made part of the sums assigned by the Bishop, by [*] the indentures of the 13th and 14th of *November 1745*. The 6700*l.* was secured on the estate of *Charles Tyrrel*, called *Thornton*, in *Bucks*. This latter is mentioned in the will only, not being comprised in the settlement. It is not ordered to be laid out in land, but the interest of both, or of the lands to be purchased therewith, after payment of the annuities, were to be paid to the said *Richard Cavendish* for life, and were to be settled after the same manner as his other estates were directed to be settled; so that he meant the money upon this mortgage to be laid out, as well as the other, in land. This introduces the question in the cause, which is, that the Bishop having given his other estates by different sets of limitations, and having distinguished according to which of those these lands were to be settled, which of the other lands these should follow, or whether the rents of the lands to be purchased should not (as we contend they should) be apportioned proportionably between the two lines of limitation of the Bishop's other estates. There can only be three constructions given to the devise: — 1st, That these sums were to go, subject to the annuities, to *Richard Cavendish* in fee, as the 8500*l.* was to have been by the will. But this could not be the intention, as the Bishop, by his will, has expressly given them to him for life, and it is clear it was not to the same uses with some of the other estates. As the other estates, therefore, though running together through several of their limitations, differ in their ultimate remainders, the money may be fairly apportioned

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apportioned between the remainder-men (the previous estates being all spent) according to their proportions of the other estates. This is the only way, except by declaring the devise void for uncertainty. He has shewn great anxiety to dispose of this property; the Court will not make him die intestate, if it is possible to avoid it.

Mr. Solicitor-General and Mr. Mitford (for *William Lyster* and other devisees of *Thomas Lyster*) contended, that the only doubt that could have arisen upon the question, as to which of the limitations the two mortgages were to have followed, would have been upon the circumstance of *Barbara*, the wife of the Bishop, having died in his life-time; that it was very clear they were not to follow the last disposition in the will, which would carry them to *Richard Cavendish* in fee; they therefore argued, that the same should be apportioned between the plaintiff as heir [*] at law of *Joyce Leslie*, and the defendants the devisees of *Thomas Lister*, according to their proportions they respectively took under the Bishop's settlement.

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Mr. Ambler, Mr. Ainge, and Mr. Graham (for the Duke of Devonshire). — The Bishop's estates are settled different ways. With respect to the mortgages amounting to 28,000*l.* the lands to be purchased with the sums secured by them, are to be to uses in which the wife took an estate for life: in the other mortgages, to the amount of 23,000*l.* she takes no interest. Then, as to the 8500*l.* that, with the leases, subject to the annuities, was to go by the settlement to *Richard Cavendish*, and his heirs for ever. Then the will revokes the grant of the two leases, and, after reciting the annuities settled upon his daughters, he gives the two mortgages in question as a security for the annuities, and, after the annuities should be paid, the surplusage of the interest of the mortgages, or of the rents of the lands, were to be paid to *Richard Chandler* for life, and to be settled after the manner, &c. as his other estates were directed to be settled. The daughters died without issue; the question is, what estates these mortgages are to follow, the uses being different as to the different divisions of the estates, or whether the devise is void for uncertainty. It will divide itself into three parts: 1st, Whether it is void, and, as such, goes to the personal representatives; — 2dly, Whether it is to be divided in proportions between the former classes and devisees; — 3dly, Whether it is to go to the third class, viz. to *Richard* in fee, either as land or as personal estate. It seems to be clear that the mortgages were intended to follow the last class of estates, and therefore were given, subject to the annuities, to the son in fee, and that he took it as real estate, and has devised it as such to his wife, whose heir at law is the Duke of Devonshire. In the settlement, the testator had arranged his estates in three classes: the first is that, in which the ultimate remainder is in *Joyce Leslie*, and to which the plaintiff is entitled; the second is that given to *Lyster* in fee; the third class that including the leasehold estates; in this class he disposes of the *Scrimshire* mortgage of 8500*l.* and the other mortgage upon *Tyrrel's* estate. The words "to be settled in the same manner as his other estates," can refer to no other class, for this is the only class in which any estates are contained. He could not intend them to be divided in proportion to the other mortgages. [*] Then the second question is, how *Richard Chandler* was to take them, whether as real or personal estate. The settlement directed all the money secured upon the mortgages, and among them the 8500*l.*, to be laid out in land. The Bishop had this also in view at the making his will, and had the same intention also with respect to the 6700*l.* though that was not contained in the settlement; he treats it as interest, subsequent to the payment of the annuities, or the rents of the lands purchased with the money; then the Bishop having made it real estate, it must continue so, *Richard Chandler*, during

his life having done no act to elect that it should be money, and estate, being given to his wife, who is dead intestate, as to her estate, the Duke, as her heir at law, must take it, and her personal representative can have no claim.

Attorney General, (for the Hon. *John Fitzwilliam*, administrator of a, the surviving daughter of the Bishop) *Mr. Madocks*, (for *Huntley*, executor and personal representative of *Catharine* am) *Mr. Selwyn* and *Mr. Stratford*, (for the personal representative *Ann Brotherton*)—contended, that the mortgages in question were voided of, and therefore were part of the personal estate. By the : “to be settled in the same manner with the other estates,” it distinctly appear what limitations they were to follow: and unless appears, the court will suffer them to go to the personal representative. The court will not change the nature of the property, unless it is necessary for the purpose of performing the clear intention of the testator's will. This was determined in a case where money was directed to be laid out in land, to be settled to the use of a bastard child, during the life-time of the father; the court would not order the money to be laid out. In *Curling v. May*, cited 3 Atk. 255. the daughter died before the money was converted, the court decreed it to be paid as personal estate. In *Flanagan v. Flanagan*, before Lord Mansfield, [7th June, 1768,] more land having been sold than was necessary to satisfy the debts, the court held it was to be disposed of as money, the testator being entitled to it not having declared in what form he would have it paid. It, therefore being money, must go, according to the codicil, to the four children, or their representatives.

Mr. Hardinge and *Mr. Richards*, for Lord Camden, personal representative of *Richard Cavendish*, and *Elizabeth* his widow.

The mortgages in question, were to go, subject to the annuities, to *John Chandler*, in fee. The fund was his own under the settlement; directed it to be considered as land, it would pass as land; in default of that direction by him, it would continue what it was—personal estate.

The will has made this point more clear in our favour than it is by the settlement; the Bishop, by the will, revoked the former intention of the mortgages, which constituted them a new fund for the testator's and other uses of the will. That new fund was personal estate, and was secured upon the mortgages. The direction in the will is certain or uncertain. If the money to be laid out, cannot be applied to the uses for which it was designed, the court will not change the direction, but it must be considered as personalty.—The words “in the same manner, &c. as my other estates,” must mean to refer it to some of the testator's estates. The question is, whether it refers to the *Leslies'* estates, or to the estate given to *Richard Cavendish*? If it is with reference to the estate united with it, which is the most reasonable construction, it is directed with leasehold property, which is given to *Richard Cavendish*, to the charges only. The gift therefore of the property to him and his heirs, will, as to the personalty, carry it to his personal representative.

Mansfield in reply.—The question in the cause is with respect to the money of the parties to the 8500*l.* and 6700*l.* secured by the two mortgages: we contend, that the money is to pass as real estate. By the settlement, the 8500*l.* was directed to be laid out in land. As to the 6700*l.* the direction of the will is, that the surplus of the interest, after paying the annuities, or of the rents of the lands to be purchased with the 8500*l.* it must, therefore, be considered as being directed to be laid out in land, and in the same situation with the 8500*l.* *Curling v. May*, is a reference to this, money ordered to be laid out in land, come from what source, must be considered as land. Then the question is between the

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the Duke of *Devonshire* and those who claim under *Lyster* and *Leslie*, who is to take it as land. — If the son is to take, it cannot be under the words of the will, but as an interest undisposed of by the testator. The Duke of *Devonshire's* counsel say, [*] that the words "in the same manner with *my other estates*," mean, that it should follow the leasehold property; but the words manifestly refer to the other estates, to be purchased with the 60,000*l.* He could not mean to give an immediate fee to *Richard Cavendish*, as he had given him the leasehold absolutely, but must have meant the other estates to be purchased and settled to their ultimate limitations, in proportions between the *Leslies* and *Lysters*. But, it is argued, that there is such an ambiguity as to his intention, that your Honour can take no notice of it. But, there is no ambiguity, for having first settled his property, he afterwards only marks out the proportions. With respect to the objection, that there is no instance of such an appointment; it is no objection, that there never was a case so similar as to require it. The testator certainly could not mean it to devolve upon the heir at law, because he had given him an estate for life, in the same property.

Master of the Rolls. — This case has been argued very much at large, and I might very well defer it for the purpose of further consideration; but I think that in a cause where there are so many parties that a delay might cause many abatements, I shall better consult the interests of the parties by giving my opinion immediately.

The facts in question, arise from the deeds of the 13th and 14th of November 1745, and the will of the late Bishop of *Durham*. Without going through the particulars of these deeds and the will, there was a sum of 28,000*l.* settled in such a manner, that the ultimate remainder was in *Joyce Leslie*; and another of 23,000*l.* the ultimate reversion in *Lyster*; as to these, or the 8000*l.* to be raised out of the lands to be purchased with the 23,000*l.* there is no doubt. The main question arises upon the mortgages of 8500*l.* upon Mr. *Scrimshire's* estate, and 6700*l.* upon Sir *Charles Tyrrel's* estate, and the necessary preliminary question is, Whether these were personalty, or real property?

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I will not decide, whether the will was, or was not, a revocation of the settlement, because, taking it upon the will alone, there is no doubt as to the question. It is not necessary, that a testator in such a case as this, should speak out; if he gives sufficient hints what his intention is, that is enough; and I think [*] in this case he has given sufficient hints to shew his intention, that the money should be laid out in land. He has directed the surplus interest, or the rents of the estates to be purchased, to follow the limitations of his other estates, by which he has shewn that he meant the money to be laid out in land. But it is said, that, finding it personalty, there is nothing in the case that calls upon me to alter the nature of the estate. The estate vested the moment the testator died. I am obliged to consider it as land, because it is given, as such, for life, to the son. If he, during his life-time, had filed a bill for a conveyance, I must have ordered the money to be laid out in land, and settled according to the directions given in the will. Then the question is, who is entitled to this, considered as land. Mr. *Mansfield* put it upon the only possible ground, upon which it could go under the will, that being an aliquot part of a fund, the integral of which was given ultimately different ways, this must be broken into portions, to follow those different limitations.

That the testator did not intend this portion for the Duke I believe, but the Duke stands here in a character favoured by the law. He appears clothed with the character of heir at law to the testator. The wife was dead at the time the will was made. If that had not been the case, I should see a ground for giving a different direction; but as the case stands, I am bound by a rule which has prevailed in the construction of wills, that

that where the court cannot see its way, the real property must be considered as undisposed of. The claim of the Duke of *Devonshire* must therefore prevail.

I must declare, that the 8500*l.* and 6772*l.* 0*s.* 6*d.* on mortgage, must be considered as real estate, and, that the Duke of *Devonshire*, as heir at law of *Elizabeth Cavendish*, general devisee of *Richard Cavendish*, is entitled to those sums.

1787.

LESLIE
against
Duke of
DEVONSHIRE.

[*] DUNCAN DAVIDSON, WILLIAM GEMMELL, Executor of ROBERT GEMMELL, Esq.; JOHN CLARKE, GEORGE FARQUHAR KINLOCK, and WILLIAM BRODIE, Esqrs. - - - Plaintiffs.

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ANDREW FOLEY, Esq.; ANN FOLEY, Widow; the Right Hon. THOMAS Lord FOLEY; and EDWARD FOLEY, Esq. Defendants. (1)
[13 June.]

(Reg. Lib. 1786. A. fol. 674.)

THE bill stated, that the defendants, Lord *Foley* and *Edward Foley*, by bond bearing date on or about the 4th day of *February* 1774, became jointly and severally bound to the plaintiff, *Duncan Davidson*, in the penal sum of 1400*l.* conditioned for payment of one annuity of 100*l.* to the plaintiff *Davidson*, by four equal quarterly payments, during the lives of the said Lord *Foley* and *Edward Foley*, and the life of the survivor of them; and at the same time the defendants, Lord *Foley* and *Edward Foley* executed a warrant of attorney, to confess judgment in the court of *Common Pleas*, for the said defendants on the said bond, for 1400*l.* and the plaintiff *Davidson*, caused judgment to be entered accordingly in the said court.

That the said *Thomas Lord Foley*, and *Edward Foley*, by other bonds, dated the 4th of *February*, the 21st of *April*, and the 25th of *June* 1774, became jointly, &c. bound to *Robert Gemmel*, and to the other plaintiffs, and several other sums, conditioned for the payment of annuities upon the same terms at seven years' purchase, and executed to them warrants of attorney, to confess judgment thereon, which judgments they had also caused to be entered up.

The bill further stated, that *Thomas Lord Foley*, Baron of *Kidderminster*, father of the aforesaid *Thomas*, now Lord *Foley*, and *Edward Foley*, being possessed of a very great personal estate, and also seized in fee-simple of the lands and tenements therein-after mentioned, duly made and published his last will and testament, executed as by law is required, to pass real estates; bearing date the 19th of *June* 1777, whereby *int. al.* he devised as follows:

[*] After subjecting all his worldly estates to the payment of all his just debts, funeral-expences, and annuities, by his said will, or by any codicil, given or bequeathed in a regular and due course of administration, he further gave and devised "all that the manor or lordship and capital messuage, called *Great Witley*, and all others the messuages, manors, lands, tenements, and hereditaments, late of, or belonging to, his said worthy relation, friend and benefactor, the Right Hon. *Thomas Lord Foley*, deceased, which he was entitled to, or enjoyed, under his last will and testament or otherwise, in the counties of *Worcester*, *Mid-Hereford*, *Stafford*, *Salop*, and *Hereford*, or either of them, (other than and except the manor of *Malvern*, in the said county of *Worcester*; and

A. by will, gave lands to trustees for terms, remainder to *T. Ld. Foley*, and *E. Foley*, for life. The trusts of the terms were for payment of scheduled debts, and to make an allowance to *Ld. Foley* and *E. Foley*. The debts being stated to be paid, a trust results to the tenants for life. A demurrer by the trustees to a bill by creditors, for an account, as having no interest, therefore over-ruled.

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also, all messuages, lands, tenements, and hereditaments, part or parcel thereof, or at any time purchased of the late Lord *Montfort*, together with such other estates, late the property of the said late Lord *Foley*, as are therein-after otherwise devised), whether freehold, copyhold, or leasehold, subject to a charge therein-after mentioned, to the use of his brother *Robert Foley*, of *Kingham*, in the county of *Oxford*, D. D. and his steward, *Abraham Turner*, their executors, administrators, and assigns, for ninety-nine years, to commence from the day of his decease, without impeachment, &c. and upon the trusts after mentioned, created and declared; and after the expiration, or other sooner determination of the said term, and subject thereto, to the use of his eldest son *Thomas* (now Lord *Foley*) and his assigns, for the term of his natural life; and after the determination of that estate, by forfeiture or otherwise, to trustees to preserve contingent remainders, &c. but to permit and suffer the said *Thomas*, now Lord *Foley*, to receive the rents, issues, and profits thereof, for the term of his natural life; with remainders over.

"And, he further willed, that all the messuages or tenements which he held by lease, from the trustees or devisees of the late Countess of *Oxford*, in the county of *Middlesex*, with all their appurtenances, should go to, and be enjoyed by his said trustees, and such persons, upon such conditions, uses, and trusts, as the said manor of *Witley*, and other the estates of said *Thomas Lord Foley*, deceased, were therein limited and devised, as far as the nature thereof would permit. Also, he gave and bequeathed all other the leasehold estates, late of the said *Thomas Lord Foley*, which he was entitled to or enjoyed under his Lordship's will, to the said *Robert Foley*, and [*] *Abraham Turner*, their executors, administrators, and assigns, to and for the same estates, uses, and trusts, as the said manor of *Witley*, and other the estates of his said deceased Lordship, were therein before limited, or as near as the tenure thereof could be bequeathed or limited, with the power and benefit of renewing such of the said leases as were renewable.

"Also he gave and devised all that his capital messuage or mansion-house, parks, and hereditaments, called *Stoke Court*, and all the messuages, lands, tenements, and hereditaments, situate, lying, and being in the parishes of *Stoke Edith*, &c. and all other the manors, messuages, farms, lands, rents, and hereditaments, whereof or wherein his late father, *Thomas Foley*, Esq. was seized and possessed, or had any estate of inheritance, freehold, or interest in; and all other his manors, messuages, lands, tenements, and hereditaments, of what nature or kind soever, respectively lying and being in the said parish of *Stoke Edith*, or in all or any of the above-mentioned parishes, in the said county of *Hereford*; and also his manor of *Malvern*, &c. purchased by the said Lord *Foley*, deceased, from Lord *Montfort*, to the said *Robert Foley* and *Abraham Turner*, their executors, administrators, and assigns, for the term of 101 years, to commence from his (the testator's) decease, without impeachment of waste, and to and for the uses therein mentioned; and from and after the expiration, or other sooner determination of that term, and subject thereto, to the use of the said *Edward Foley*, and his assigns, for and during the term of his natural life, and from and after the determination of that estate, to the use of trustees to preserve contingent remainders, but to permit and suffer the said *Edward Foley* to receive the rents, issues, and profits thereof, for and during the term of his natural life; and from and after his decease, to the other persons therein-after mentioned and described.

"And as for and concerning the several terms of 99 years and 101 years, therein respectively limited to the said *Robert Foley* and *Abraham Turner*, their executors, administrators, and assigns, he thereby declared, that the same were so respectively limited, upon this special

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nce, and to the intent and purpose that they, the said *Robert and Abraham Turner*, and the survivor of them, and the executors, administrators, and assigns of [*] such survivor, should yearly and every year receive and take the rents, issues, and profits of all and every the messuages, lands, tenements, and hereditaments, comprised in such respectively; and should, from time to time, fell and cut down so much such parts of the timber, wood, and underwood, growing upon in the said manors, &c. as they, or he survivor, or the executors, administrators, or assigns of such survivor in his or their judgment and discretion should think proper to be fallen, not exceeding, in any one year, the sum of 3000*l.* (without defacing or disfiguring the ornamental parts in or near his several capital mansion-houses of *Witley and Dore* said,) and to pay, apply, and dispose of so much of the money therefrom, as would be sufficient, (with the rents and arrears of the said premises comprised in the said terms, that should be due at his decease, which he gave and bequeathed to them the said trustees said) in manner following, that is to say, in the first place, according to their will and pleasure, and not otherwise, to allow yearly and every year, to or for the use or benefit of his said two sons, *Thomas and Edward Foley* and *Edward Foley*, any sum or sums of money, not exceeding, in the whole, in any one year, the sum of 6000*l.*, until such time as the said *Thomas* (now *Lord*) *Foley*, and *Edward Foley*, as therein provided for, and should be due at his decease, were first paid and distributed, but so as his said two sons, or either of them, should have no right, title, claim, or interest in the rents, issues, and profits of his said manors, messuages, &c. comprised in the said terms, for and during the respective lives of his said two eldest sons, and the life of the survivor of them, than the said *Robert Foley* and *Abraham Turner*, and the survivor of them, and the executors, administrators, and assigns of such survivor, should, in their absolute, free, and uncontrouled power, direction, discretion, think proper and expedient, any thing contained in his said will to the contrary thereof in anywise notwithstanding; and in the meantime thereout to pay so much and such part of the principal and due upon a mortgage, by him and his said eldest son made to *John Child*, Esq. bearing date the 2d of July 1773, as should be unpaid at his decease; and in the next place thereout to pay and discharge all such debts of his said two eldest sons, *Thomas Foley* and *Edward Foley*, and the interest due thereon respectively, as in any of the said schedules thereunto annexed, or in any other schedule or schedules hereafter to [*] be made and subscribed, should be contained, or the said trustees, in their judgment and discretion, should think proper and expedient, but so as no one of the creditors of his said two sons, *Foley* and *Edward Foley*, other than such whose debts should be secured, should have a lien upon, or power over, any of the manors, messuages, lands, tenements, and hereditaments, comprised in the said terms of 99 years and 101 years, or in either of them, or on the profits growing thereon, or on the money arising or to arise thereby, in any manner whatsoever; and after the decease of the survivor of his said two sons, the payment of the mortgage money, and of all the said debts and other debts herein before mentioned, and also of the costs, charges, and expences of the said *Robert Foley* and *Abraham Turner*, and the survivor of them, and the executors, administrators, and assigns of such survivor (which he thereby authorised and enabled them to deduct and pay out of the rents and profits of the said manors, &c. comprised in the said terms) his will was, that the said terms should wait until the inheritance of the said manors, messuages, lands, &c. and hereditaments comprised therein.

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And

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And the testator, *Thomas Lord Foley*, " in case his personal estate should not be sufficient to pay and discharge the legacies in his said will mentioned, thereby subjected and charged all and every the manors, messuages, &c. thereinbefore mentioned, given and devised to him by the said *Thomas Lord Foley*, and not thereby devised to be sold, with the payment of so much thereof as his personal estate, not specifically given, should fall short and not be sufficient to pay; and then he gave and devised all that the manor or lordship of *Broughall*, and all and every his messuages, lands, tenements, and hereditaments in the county of *Stafford*, and also all his manors, messuages, lands, tenements, and hereditaments in the county of *Gloucester*, not thereinbefore by him devised, and also all his freehold messuages, lands, tenements, and hereditaments in the county of *Middlesex* (his capital mansion of *Foley House*, in the said county, with all and every its appurtenances, excepted), with their and every of their respective rights, members, and appurtenances, to, and to the use of the said *Robert Foley* and *Abraham Turner*, their heirs and assigns, in trust, to sell the same, at the best prices that could or might be had or gotten for the same, and to apply and dispose [*] of the money arising and to arise by such sale, (after discharging the said mortgage, and their own costs and charges attending the said trust) in payment of his legacies and annuity, and afterwards in payment of the debts mentioned in the said schedule, in the same manner as the money arising and to arise, under and by virtue of the terms of 99 and 101 years, is directed to be applied and disposed of; and appointed his son *Andrew Foley*, his daughters *Grace Lady Clanbrassil*, *Mary Foley*, and *Ann Winington*, together with his said brother *Robert Foley*, and the said *Abraham Turner*, executors and executrixes of his said will."

That the schedule referred to by his said will, was to the purport set forth in the schedule to the plaintiff's bill annexed.

That *Abraham Turner* having died in the life-time of the testator, he, on the 17th of *February*, 1777, duly made and published, as by law is required to pass real estates, a codicil to his said will, whereby he appointed his son *Andrew Foley* a trustee in his room.

That the testator, *Thomas Lord Foley*, died on the 14th of *November* 1777, leaving the said *Thomas*, now *Lord Foley*, his heir at law, without having altered or revoked his said last will, except by the said codicil, and without having altered or revoked the said codicil; and the said *Robert Foley* and *Andrew Foley* duly proved the same, and the said *Andrew Foley* alone acted in the execution thereof.

That the plaintiffs (great arrears being due on their aforesaid annuities, that is to say, 1025*l.* to the plaintiff *Duncan Davidson*, 2050*l.* to the plaintiff *William Gemmell*, 1000*l.* to the plaintiff *John Clarke*, 1000*l.* to the plaintiff *George Farquhar Kinloch*, and 1512*l.* 10*s.* to the plaintiff *William Brodie*, respectively arrears of their annuities) caused a memorial of their said securities to be enrolled according to law, and afterwards procured writs of *scire facias* to be issued, for the purpose of reviving the said judgments; and the defendants *Thomas* (now *Lord*) *Foley* and *Edward Foley* being duly served therewith, and the plaintiff *William Gemmell* having brought into court the letters testamentary of the said *Robert Gemmell*, the plaintiffs *Duncan Davidson*, *William Gemmell*, *John Clarke*, *George Farquhar Kinloch*, and [*] *William Brodie*, severally had judgment for their respective debts and damages aforesaid.

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That the plaintiff *Duncan Davidson*, and the other plaintiffs, having such sums of money due to them as aforesaid, secured by the aforesaid judgment, on or about the 11th of *October*, 1786, sued out of the said Court of Common Pleas several writs of *elegit*, directed to the sheriff of *Herefordshire*, against the goods and chattels of *Edward* and *Lord Foley*, or either of them, and a moiety of all the lands and tenements of the

the said *Edward* and *Lord Foley*, or either of them, in his bailiwick; and the sheriff of *Hereford*, in obedience to the said writ, summoned a jury of his county, who, being sworn, on the 19th of *October*, 1786, upon their oaths said, that the said *Edward Foley* was on that day possessed of, or entitled unto, an equitable estate in the residue of a certain term of 101 years, commencing on the day of the decease of the said testator *Thomas Lord Foley*, for so long of the said term as he, the said *Edward Foley*, should happen to live, of and in the premises particularly described in the inquisition, subject to the trusts thereof declared by the said will of *Lord Foley*, deceased, and then was seised in his demesne as of freehold, for the term of his natural life, subject to the said term of 101 years, and the trusts thereof, of and in certain premises in the said inquisition described, but found that the said *Edward Foley*, on the day on which the said judgment was given, or at any time since, had not any other goods and chattels, lands or tenements in the said county.

That immediately after the death of the said testator *Lord Foley*, his executors entered upon and possessed the lands, tenements, and hereditaments devised to them as aforesaid, and they, and the survivor of them, *Andrew Foley*, hath ever since been in the perception of the rents and profits thereof, except such parts of the said estates, devised to be sold, as have actually been sold; and by the sale of some part of the said last-mentioned estates, and the rents, issues, and profits of all the others, the said trustees, and the survivor of them, have paid off and discharged the said mortgage to *Robert Child*, the debts enumerated in the schedule to the testator's will, and all other the debts of *Thomas* (now *Lord*) *Foley* and *Edward Foley*, which they, or [*] either of them, owed at the time of making the said will, except the debts due to the plaintiffs.

The plaintiffs therefore charged that the will of the said testator *Thomas Lord Foley*, as far as it endeavours to enable the trustees to pay to the said *Thomas* (now *Lord*) *Foley* and *Edward Foley* the sum of 6000*l.* per annum, or any part thereof, is a fraud upon the law and upon the plaintiffs and other the creditors of the said now *Lord* and *Edward Foley*; and that they, since the return of the aforesaid inquisition, had given the aforesaid *Andrew Foley* notice thereof, and desired him not to pay any part of the said 6000*l.* per annum to the said *Thomas* (now *Lord*) *Foley* and *Edward Foley*, or either of them.

They further stated, that the said *Robert Foley*, one of the trustees, departed this life in *February* 1783, having made his last will, and appointed *Ann Foley*, his widow, his sole executrix, who duly proved the same; and at the time of his death he had in his hands a considerable sum of money, the produce of the said trust estates; and that the said *Andrew Foley* and the said *Ann Foley* have in their possession a considerable sum of money, the produce of the estates devised to them in trust as aforesaid, not applied to the purposes of the said trust.

The bill therefore prayed an account, and if all the aforesaid debts are paid that then the said terms might be declared to be possessed by the said *Andrew Foley* in trust to attend the inheritance, and that the said *Andrew Foley* be restrained by injunction from setting up the terms to defeat any action, ejectment, or other remedy which the plaintiffs may be advised to pursue for recovery of the sums of money due to them as aforesaid, and that they may not be allowed the payments made to *Thomas* (now *Lord*) *Foley* and *Edward Foley*, upon account of the said 6000*l.* respectively, such as have been made since the service of the notice hereinbefore mentioned; and for further relief.

To this bill the defendants, *Andrew Foley* and *Ann Foley*, put in a general demurrer, because they say that the plaintiffs have not shewn any title in equity to the discovery and relief thereby prayed.

[*] *Mr. Price*, *Mr. Mansfield*, *Mr. Poole*, and *Mr. Richards*, (in support

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support of the demurrer).— The plaintiffs are all creditors of *Thomas* (now Lord) *Foley*, and *Edward Foley*, the two eldest sons of the late Lord *Foley*, on account of annuities purchased by them, at the rate of seven years' purchase for both lives. They have entered up judgment, which they have revived by *scire facias*, and sued out writs of *elegit* to take possession of the whole personal, and half of the real estates of Lord *Foley* and *Edward Foley*, and now have filed this bill against them, the surviving trustee, and the widow of the deceased trustee in the late Lord *Foley's* will, praying that the lands may be delivered to them, as tenants by *elegit*, and that the trustee may be restrained from setting up the trust terms against any ejectment they may bring to obtain possession of the lands.

To this bill the defendants, the surviving trustee and the executrix of the deceased trustee, have put in a general demurrer, because the plaintiffs have not shewn that they have in equity any right to the discovery or relief prayed. The first question will be, whether Lord *Foley* could dispose of the estates in this way; 2dly, whether the mode in which he has done it gives Lord *Foley* or *Edward Foley* any right in the estate. The bill alleges that the will, as far as it allows the said trustees to pay the rents to Lord *Foley* and to *Edward Foley*, is a fraud upon the law and upon the plaintiffs: but this cannot be so; Lord *Foley* might certainly dispose of the estate in such a way as to prevent his sons from taking any interest in it; there could be no fraud upon the law in giving such an estate as should not be liable to the debts they might contract; he might have put it into the power of the trustees to give his sons what they pleased.

The terms were intended to exclude the sons from taking any estate during their lives; for which purpose, it was provided that the terms should not attend the inheritance until after their deaths. The circumstances under which they stood, called upon the late Lord to prevent their taking any estates during their lives, because, as soon as they came into possession, they would be left without any provision. He meant, therefore, only to give them such a provision as the trustees should think proper: no resulting trust was intended to them, and without an intention that there should be such, no resulting trust could arise, 1 Atk. [*] 619. — then none would arise contrary to the testator's intent. It is said, 6 Bro. P. C. 489. that in resulting trusts, the nature of the case, and not any rule of law, must be the rule of the court. According to the will, the trustees were yearly or oftener to allow the sons any sum, not exceeding 6000*l.* in any one year, until the scheduled debts should be paid, but so that his sons should not have any estate, right, title, &c. in the rents of the estates, during their respective lives, other than the trustees should think expedient. After their decease, and the payment of the scheduled debts, the trust was to attend the inheritance; the intent therefore was, that it should not attend the inheritance sooner than their deaths, that nothing should ever vest in them.

There is also a negative upon any creditors but the scheduled creditors having any interest; it may be different as to the sons themselves, and as to persons claiming under them, they may have a right to know that the fund is applied, and might perhaps be entitled to come into this court, for the purpose of seeing that it was preserved; but this will not extend to any creditors except those in the schedule. — As to themselves, they could not compel the payment of a farthing. When they should be dead, a question might arise as to the intermediate rents and profits; the representatives of the sons might probably have a right to them; but that will not, contrary to the intent of the testator, deprive the trustees of the right of accumulating them in the mean while.

With respect to the writs of *elegit*, the plaintiffs make out their rights merely

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merely under the *elegits*, but the inquisition does not describe any extendible interest within the stat. of 29 Car. 2. Nothing was the object of that act but what might be taken into possession or pendency of profits. A legal estate in reversion, could not be extended, and the statute only put trust estates into the same situation with similar legal interests. The 10th section of the stat. is, that the sheriff might make and deliver execution of the trust estate, *like as* he ought to have done, if the party against whom the execution is sued, had been seized of the premises of such estate, as they are seized in trust. A dry reversion in a legal estate was not subject to an *elegit*; so the dry reversion of a trust could not. The statute assimilates it to a trustee dying, leaving assets by descent, that must be an estate in possession. [*] The inquisition states, that *Edward Foley* was possessed of an equitable estate in the residue of the term, and then goes on to state, that he was seised for life, in his demesne, as of freehold, subject to the said term and the trusts thereof; so that it is uncertain whether the terms were to be delivered over as the residue of a term, or as a freehold estate. The statute therefore cannot extend to this interest, of which no possession can be given; and the creditors have no interest in the estate, an account of the rents of which they claim.

Lord Chancellor. — I cannot doubt it. I would not willingly break in upon any power given by a father, to control the extravagance of his sons; I would rather extend those powers than control them. But, in the present case, the question is, whether the uses for which the trust was created being exhausted, (as it must be taken they are,) a trust does not result to the tenants for life? It has been ingeniously argued, that there are trusts extending beyond their lives, and that, if those trusts are sufficient, the sons are to have no interest during their lives. The nature of a resulting trust is, that it is such as escaped the intention of the testator: and here, the intention of raising a trust beyond the payment of the scheduled debts is so totally unexpressed, that no trust can be raised upon the terms used. If there were words to give the trustees a further power of disposing of the rents and profits for any further purposes, I should have been glad to have taken hold of them.

The rule of law is, that, where the trusts of a term are exhausted, a trust results, for want of a further disposition, to the legal tenants. In my judgment, these must now be resulting trusts, and therefore they must go to the tenants for life. The discretion of the trustees should be extended, against such plaintiffs as these, as far as possible, if there were such grounds as would apply to other cases as well as this. I do not see what they expect to gain by their bill: but I cannot stop them at this period of the cause.

Demurrer over-ruled. (2)

(2) See this case at the hearing, *post*. 3 vol. 598.

[*] *KENRICK against CLAYTON*. [13 June.]

(Reg. Lib. 1786. A. fol. 452.)

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[*Vide* 8. C.
2 Dick. 685.]

A MOTION had been made in this cause, for time to answer. Upon the expiration of the time, a demurrer was put in. It had been re-

Upon time
granted to
answer only,
a demurrer

(though only to part, and answer to the rest) shall not be put in. (1)

(1) See *Taylor v. Milner*, 10 Ves. 444. *Mann v. King*, 18 Ves. 297. and *Edmonds v. Merry*, 3 Merivale, 304.

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ferred to the Master, whether the demurrer was regular, and he had reported it to be so.

Upon an exception to the Master's report, Mr. Selwyn and Mr. King maintained the exception — that the demurrer was irregular.

Mr. Madocks and Mr. Ainge, in support of the Master's report. — The ordinary method of drawing up the order, is for such a length of time to plead, answer, or demur, but not to demur alone. Here the order was complied with — an answer was put in to part, and a demurrer to other part. The Master has reported that the demurrer was regular, and states that he finds it so upon examining into the practice of the court.

Lord Chancellor. — When you take time to answer, you consent to answer. If you applied on particular grounds for leave to demur, I might grant the motion, but not to demur alone: but if the application is to answer, the party cannot himself dispense with it, but must answer.

Exception allowed. †

† This is a distinction, to be observed, between a plea and a demurrer. A plea, though a dilatory, being on oath, is considered as an answer; and, therefore, is a compliance with the order; but a demurrer is not so. See *Jones v. Lord Stafford*, 5 Williams, 81; 2 Williams, 464; Mosely, 207; *Roberts v. Hartley*, ante, vol. i. p. 56.; (and the Editor's note.)

[*215] [*] EDWARD TRAFFORD NICOLLS, an Infant, by SIMON DEBANK,
his next Friend, - - - - - Plaintiff.

WILLIAM SHEFFIELD, GEORGE VERNON, EDWARD NICOLLS,
ROBERT NICOLLS, THOMAS NICOLLS, an Infant, ELIZABETH
NICOLLS, SARAH NICOLLS, and WILLIAM NICOLLS, Defendants.

(Reg. Lib. 1786. B. fol. 595. b.)

Master of the
Rolls for the
Lord Chancellor.

Proviso in a will, that in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate, to the use of the next person in remainder, valid.

And the eldest son of the tenant in possession is the next person in remainder.

WILLIAM TRAFFORD, by his last will and testament, bearing date the 10th of February, 1758, duly executed for passing freehold estates, devised all his moiety of the manor of *Heaton*, in the county of *Stafford*, and all that his capital messuage called *Swithamley Grange* and other estates in the counties of *Stafford* and *Chester*, to *Edward Sykes* and *John Birtils*, and their heirs, upon the trusts following, viz. to the use of his daughter *Sarah Nicolls* for life, with remainder to the use of *Samuel Nicolls*, third son of the said *Sarah*, for life, remainder to trustees to support contingent remainders, remainder to the first and other sons of the said *Samuel Nicolls* successively in tail male, remainder to the use of *Edward Nicolls*, (the plaintiff's father,) fourth son of his said daughter *Sarah*, for life, remainder to the said trustees to support contingent remainders, remainder to the first and other sons of the said *Edward Nicolls* successively in tail male, remainder to *Robert Nicolls*, fifth son of his said daughter *Sarah*, for life, remainder to the trustees to support contingent remainders, remainder to the first and other sons of the said *Robert Nicolls* successively in tail male, remainder to his own right heirs.

Thomas Nicolls, late of *Whitchurch*, in the county of *Oxford*, made his last will and testament, bearing date the 11th of June, 1776, whereby he devised unto the defendants, the Reverend *William Sheffield*, Clerk, and *George Vernon*, and to their heirs, executors, &c. all his freehold and leasehold lands in *Whitchurch* aforesaid, and elsewhere in the county of *Oxford*, and also all such money as should be due to him on government or private securities, and all such money as he should die possessed of, and

as should be due to him for rents, and all other accounts, (except in-after mentioned) in trust, to sell all his freehold and leasehold in the said county of *Oxford*, and out of the money arising therefrom and from other his personal estate, to pay all such debts as should be due and owing from his late uncle, the Reverend *Samuel Walker*, deceased; as also all such debts as he should owe at his decease, his funeral and testamentary expences, and the several legacies by him hereinafter given and bequeathed. The testator then devised unto him and *William Sheffield* and *George Vernon*, and their heirs, all his real estates in the county of *Stafford*, or elsewhere in the kingdom of *Britain*, (before unbequeathed) upon the trusts, and to, for, and the uses following, viz. in trust to receive and take the rents and thereof to pay debts, &c. in aid of the *Oxfordshire* estates, if they should not be sufficient, and subject thereto; in trust to pay an annuity to his brother *Robert Nicolls*, and some other annuities, and to the sums of 500*l.* each for certain nephews and nieces of the testator; subject thereto, to pay the overplus rents and profits of my last devised freehold estates unto my said brother *Edward Nicolls* (the plaintiff's) for and during the term of sixty years (to be computed from the day of my death), if the said *Edward Nicolls* shall so long live (subject to the proviso hereinafter mentioned relating thereto); and from and after the expiration of the said term, or the decease of the said *Edward Nicolls*, which shall first happen, then my said trustees, and their heirs, and I am seized of my said last devised messuages, lands, tenements, hereditaments, subject and charged as aforesaid, to the use of the first son of the body of the said *Edward Nicolls* to be begotten, and the heirs of such first son lawfully issuing (subject to the proviso hereinafter mentioned); and in default of such issue (subject and charged as aforesaid), to the use of the second, third, fourth, and all and every other sons and daughters of the body of the said *Edward Nicolls* to be begotten, and in default of such issue, then to pay the overplus rents and profits of my said last devised messuages or tenements, lands and hereditaments, unto my said brother *Robert Nicolls*, for and during the term of fifty years, computed from the day of the death of the said *Edward Nicolls*, if he should so long live; and if he should not so long live (subject to the proviso hereinafter mentioned); and from and after the expiration of the term of fifty years, or the decease of my said brother *Robert Nicolls*, which shall first happen, then my said trustees shall (subject and charged as aforesaid) stand seized of my last devised messuages, tenements, and hereditaments, to the use of the first son of the body of the said *Robert Nicolls*, my brother, begotten or to be begotten, and the heirs of the body of such first son, lawfully issuing (subject to the proviso hereinafter mentioned); and in default of such issue (subject and charged as aforesaid), to the use of the second, third, fourth, and all and every other sons and daughters of the body of the said *Robert Nicolls*, my brother, begotten or to be begotten, &c. with other remainders over. And my express will and meaning is, in case my said brother *Edward Nicolls*, or the heirs of his body, or my said brother *Robert Nicolls*, or the heirs of his body, shall become seized of the estates which my late grandfather, *William Trafford*, Esq. died seized, either by the will of or under his will, or by any other ways or means whatsoever, then and from thenceforth the trusts hereby declared, of the last devised messuages, lands, tenements, and hereditaments, for the use and behoof of such person and persons as shall so become seized, shall, from the death of him, her, or their becoming so seized, cease, determine, and be utterly void; and my said trustees and their heirs shall immediately stand seized of my last devised messuages, lands, tenements, and hereditaments, to and for the use and benefit of the person or persons

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next in remainder, by virtue of this my will, and in such and the like manner as he, she, or they would be entitled thereto, in case the person or persons so seised of my grandfather's estates was or were actually dead, any thing herein contained to the contrary notwithstanding.

Thomas Nicolls died in 1782: the trustees in his will took possession of his estates; and all his and his uncle's debts being paid, were seised thereof to the use of Edward Nicolls, the plaintiff's father, for the term of 60 years, if he should so long live.

William Trafford died in 1765; and by virtue of his will, Sarah Nicolls, his daughter, entered upon the estate devised to her for life: she died in 1785, and Samuel Nicolls, the second devisee, having died in 1783, Edward Nicolls, the father of the [*] plaintiff, became entitled for life to the estate devised by William Trafford.

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Upon Edward Nicolls, the plaintiff's father; coming into possession of this latter estate, the plaintiff, the 13th of May, 1786, filed this bill, stating himself to be the eldest son of the said Edward Nicolls, and insisting that the defendant Edward Nicolls, being in possession of the estate devised by William Trafford, his estate and interest in the estate devised by Thomas Nicolls was determined, and that he, as being the next person in remainder in Thomas Nicolls's will, was become entitled to that estate.

The question was as to the validity of the proviso.

Mr. Scott, for the plaintiff, only stated the proviso; and that under it the plaintiff was, he said, entitled as next person in remainder to the Nicolls estate.

Mr. Coke, for the defendant, Edward Nicolls the father, argued, that the proviso was illegal, and tended to render the estate unalienable longer than the rules of law will permit; that in this respect it had some analogy to the case of *Perrin v. Blake*.

Mr. Price, for Robert, contended he was the next person in remainder.

Master of the Rolls. — There is no doubt with respect to the validity of the proviso: several estates are held under similar limitations. No rule of law is contradicted by it; and if no recovery was suffered, it might take place at any distance of time. I might as well be told that an estate tail is an illegal estate, because it may endure for ever, and must, where the remainder is in the crown. I am clearly of opinion, that, in the event which has happened, Edward Trafford Nicolls is entitled to an estate tail in possession in the premises devised by Thomas Nicolls's will, subject to the charges.

Decree for the plaintiff.

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[*] Lord PORTMORE against MORRIS and Another.

Rolls, 30th of
June.

(No entry.) (1)

Parol-evidence that it was part of the agreement for an annuity, that it should be redeemable, although not made part of the contract in writing, refused to be admitted. (2)

LORD Portmore, (aged about 24 years) in consideration of 2000*l.* paid by Thomas Rosoman, granted him an annuity of 300*l.* per annum during the grantor's life, secured by bond, and also by a conveyance of

(1) See on this case in *Haynes v. Hare*, 1 H. Black. 663, 664. note.

(2) S. P. *Lord Irnham v. Child*, ante, 1 vol. 92. with the notes; and *Hare v. Sheerwood*, 3 vol. 168. and 1 Ves. jun. 241. See also *Poole v. Carbanes*, 8 T. R. 328.

his

his share in the navigation of the river *Wye* for 99 years; if he should so long live. It was in evidence in the cause, that it was agreed between the parties, that the annuity should be redeemable at any time, upon payment of the arrears then due; but that it was represented to the plaintiff, by the defendant or his agents, that the insertion of such agreement would make the transaction usurious. *Rosoman* being dead, and all arrears paid of the annuity to that time, the plaintiff, on the 28th of *April* 1785, gave notice to the executors, that he would, on the 21st of *July* following, pay the 2000*l.* together with the quarter's annuity which would become due on the 28th of the same *July*; and accordingly, on that day, he made a tender of the same, which being refused by the acting executors, the plaintiff filed this bill, praying that the executors might be decreed to accept the same, and deliver up the securities; and in the mean while for an injunction.

The question was upon the admissibility of the parol-evidence of the agreement that the annuity should be redeemable. (1)

His Honor said, — Before the statute of frauds, parol-evidence could not be admitted to contradict written agreements, except in very particular cases indeed; and, after, deeds were under the same rules. (3) If fraud was imputed, it might be done here; but it is dangerous to depart from the deeds. It might be the intention that the annuity should be redeemable, but I can only get at it by demolishing one of the foremost rules of law; therefore I reject the evidence, but will give no costs to any party. Bill dismissed.

(1) See note (1) in the preceding page.

(3) As to the distinction between assisting a person coming as a plaintiff to have such omissions rectified, and that of a defendant resisting a performance according to the strict letter of a written instrument, see *Rich v. Jackson*, post. 4 vol. 514. and 6 Ves. 334. note (a). *Morg. Townshend v. Stangroom*, 6 Ves. 328. 332, &c. *Woollam v. Hearn*, 7 Ves. 211. *Cadman v. Horner*, 18 Ves. 10. 12. *Savage v. Brocksop*, *ibid.* 335, &c.

[*] *EWBANK against HALLIWELL.*

(Reg. Lib. 1786. A. fol. 590.)

BILL filed by *Ewbank* and his wife, for a legacy left to the wife by her former husband, by a will made before their marriage.

It was slightly objected, that the subsequent marriage between the testator and the legatee, was a revocation of the legacy.

But the Lord Chancellor decreed the legacy to be paid.

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Lincoln's Inn Hall, July 6.

Marriage with a legatee no revocation.

THOMAS FREWEN, and PHILADELPHIA FREWEN, his Wife, and CATHERINE BERRY, — — — — — Plaintiffs.

LUCY RELFE, now deceased, and WILLIAM HENRY BENGE, and MARY CRIPPES, Executrix of the said LUCY RELFE, Defendants.

(Reg. Lib. 1786. A. fol. 671.)

Lincoln's Inn Hall, July 9th.

ELIZABETH NORTON, by her will, bearing date on or about the 12th day of *June* 1773, after making several devises and bequests

Persons taking a residue as executors, take

as joint-tenants; therefore, if one die before severance, his share survives. (1)

(1) See note (2) in the next page.

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to the persons therein named, (among whom were Mrs. *Frewen*, Mrs. *Berry*, and *Benge*, three of the executors,) declared it to be her desire, that if any of her legatees should die in her life-time, or before their legacies became due and payable to them or any or either of them so dying, the same should go and descend *equally* between *her* executrixes; and did thereby appoint her cousins, Mrs. *Frewen* and Mrs. *Berry*, widow, executrixes, and Mrs. *Barry*, widow, an executrix.

The said testatrix, after making such will, did, at different times, make several codicils, and among others the following: "I give to each person, to whom I have given any money legacies, double their sums, or as much more as is given them in my will, to be paid by my executors, and desire this codicil to be taken as part of my will; as witness my hand, this 13th day of September 1775, *Elizabeth Norton*."

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"Whereas I have by my will, hereunto annexed, made, and appointed my cousin Mrs. [*] *Barry*, one of my executors therein: now I do by this my codicil, which I desire may be taken as part thereof, revoke and alter her executorship, and all power, authority, and estate whatsoever therein, given as one of my said executors, and do hereby name and appoint Mrs. *Lucy Relfe*, and Mr. *William Henry Benge*, my executors in the room, place, and stead, with the same power, authority, and share of my estate, as the said Mrs. *Barry* would have had by virtue of my said will, with the other executors, in every respect whatsoever. Witness my hand, *Elizabeth Norton*, August the 6th, 1776."

"Whereas also, I have by my said will appointed *Elizabeth Barry*, one of my executors, named therein; now I do by this my said codicil, revoke and make void her said executorship, and in her room and place do hereby make and appoint my good friend *Mary Barham*, of *Linfield*, spinster, executrix. In witness whereof, I have to this my said codicil, which I desire may be taken as part of said will, set my hand and seal this 13th day of December 1777. *Elizabeth Norton. L.S.*"

"I do by this my codicil to my will, name and appoint my friend and cousin *Catherine Berry*, one of my executors to my said will, in the room and place of her late mother, *Mary Berry*, deceased, and give her the same in every respect whatsoever, as her mother would have had and received at my death. by my said will. Witness my hand, this 6th day of May 1780. — *Elizabeth Norton*."

Mary Berry, and *Mary Barham* died in the life-time of the testatrix, who died in November 1781, and the will was proved by the surviving executors in the ecclesiastical court.

A bill was afterwards filed in this court, by the next of kin to the testatrix, against the surviving executors and executrixes claiming the residue of the testatrix's estate, on account of some of the executors and executrixes having devised or legacies under the will; which bill was dismissed, the Court holding that circumstance not sufficient to bar the claim of the executors to the undisposed residue.

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A suit was also brought in the ecclesiastical court, on the question, whether the second codicil, whereby the appointment of *Elizabeth Barry*, as an executrix was revoked, and *Mary Barham* was appointed in her room, had revoked the former [*] codicil, by which *Lucy Relfe*, and *Henry Benge* were appointed executors in the place of *Elizabeth Barry*; when it was held not to be a revocation, but an additional appointment, and that they were all executors.

(2) See the Editor's notes and references to *Perkins v. Boynton*, ante, 1 vol. 118. especially *Crooke v. De Vandes*, 9 Ves. 197. 204. 11 Ves. 330. *Jackson v. Jackson*, 9 Vet. 591. *Swaine v. Burton*, 15 Ves. 365, &c. See also *Balwyn v. Johnson*, post. 3 vol. 455. *Morley v. Bird*, and *Stuart v. Bruce*, 3 Ves. 629. & 632. and the distinctions 2 *Roper* on Leg. 542, 543, 544.

The present bill was then filed, by the present plaintiffs, against *Lucy Relfe*, and *Henry Benge*, insisting that the testatrix having appointed the plaintiff, *Philadelphia Frewen*, and the said *Elizabeth Barry* and *Mary Barry*, executrices, and having, by the codicil of the 6th of August 1776, substituted the defendants to be executors, in the place and stead of *Elizabeth Barry*, and by the codicil of the 6th of May 1780, appointed *Catherine Berry*, in the room of *Mary Barry*; that it appears to have been the testatrix's intention, that the plaintiffs *Philadelphia Frewen* and *Catherine Berry*, should each be entitled to one-third of the residuum, and the defendants are entitled to one-third only. — The defendants, by their answers, claimed fourth parts each of the residue. After the answers of the defendants had come in, and the cause was set down to be heard, *Lucy Relfe* died, having made her will, and appointed *Mary Crippes* sole executrix, on which a bill of revivor was filed, and she was made a defendant in the cause.

The cause came on now to be heard. Mr. *Hardinge*, Mr. *Scott*, and Mr. *Campbell* for the plaintiffs. — There are two questions:

1st, As to the original claims, whether all the executors were entitled equally, or the defendants were entitled only to the share of *Elizabeth Barry* between them?

2dly, Whether *Lucy Relfe*'s share had survived to *Benge*, or the other executors, or the defendant *Crippes* is entitled thereto, as her representative?

1. The effect of the will and codicils is, that *Philadelphia Frewen* is entitled to one-third, *Catherine Berry* to another third, and the two survivors of the three substituted executors to the other third between them. The original executors were intended to be tenants in common. This appears from the bequest of the lapsed legacies. If the executors were to take them as tenants in common, it is an argument, to prove she intended [*] them to take the residuum in the same manner. Then with respect to the substituted executors *Relfe* and *Benge*, they are to be in the room, place, and stead, with the same power, authority, and share of her estate, as Mrs. *Barry*. This would be impossible, unless the former executors took in common, as two persons could not take the share of one upon any other construction. *Catherine Berry* could not have taken her share of her mother, unless they were tenants in common, the substituted executors would have taken equally with *Frewen*, and then *Catherine Berry* could only have taken one-fourth part in joint-tenancy. The testatrix certainly meant the substituted executors only to take Mrs. *Barry*'s share. Had she meant otherwise, she had nothing to do but to appoint them executors generally.

2. With respect to the second question, although the substituted executors were tenants in common with the two original executors, yet, with respect to their own third, they were joint-tenants, and they have done no act to sever the jointure.

Mr. *Mansfield* and Mr. *Hollist* (for the defendant *Benge*). — The object of the plaintiffs is to obtain a larger share of the residue than the two others, although they all claim in the character of executors. Taking in that character, they must take as joint-tenants, and there is nothing in the will to prevent their taking in that character. The word, *equally*, is not sufficient to control the general appointment as executors, or to shew they were to take in any other capacity, or in other proportions. But, even supposing there was any thing to control the common effect of the words, there is nothing in the will to give the plaintiffs two-thirds, and leave but one for the three others, and by that means reduce them to take each one-ninth of the residue. Upon the words of the codicil, it is only to take an equal share; it does not say they shall take in thirds; but they are to be equal in every thing, in power and authority. It does not

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not share out the property, but to share as Mrs. Barry would have done with the other executors.

2. Mrs. Relfe being dead occasions a new question as to the lapsed legacy between Mr. Bengé, and her representative. If they are to take only a third, dividing the residue as joint-tenancy, that third will survive to Mr. Bengé, and he will take the same share as the plaintiffs. As there were four surviving [*] executors taking as executors and joint-tenants, so, she being now dead before severance of the joint-tenancy, they are again reduced to three, and will each take thirds of the residue.

Mr. Madocks and Mr. Stratford (for Mary Crippes, the representative of Lucy Relfe). — The defendants, by their answers, say, that the claim was not in thirds, but that they are all entitled to equal shares. The answer will operate as an agreement between them, and therefore will sever the jointure. A note that they had agreed to sever the jointure would be sufficient; but this point arising between adverse defendants, cannot be decided now. Either a cross bill must be brought, or it must go to the Master, as it does not appear but that Lucy Relfe may have done some act to sever the joint-tenancy.

Lord Chancellor. — Is there any case that has carried tenancy in common so far as to give a residue to executors as tenants in common, and not in the manner in which they usually take? And, if in fact, they were joint-tenants, could their having joined in an answer that it was a tenancy in common, have the operation of a severance? A note certainly would do it, because the joint-tenancy may be severed by any contract (2); and if they said in their answer that they agreed so to do, I should construe them to have done a sufficient act to sever. The first clause in the will is certainly not sufficient to make the executors tenants in common; I never knew any construction carried so far. In giving the lapsed legacies, the executrix has used the word *equally*. Certainly the word *equally* has been held to give a tenancy in common, but that is always with reference to the other parts of the gift. (3) The general intent of the testator will overrule the word *equally*, rather than the word *equally* shall overrule the general intent of the testator. From the whole of the words, I think she meant them all to be executors, with equal authority and equal shares, and that, they being now reduced to three, those three must take in equal shares. There is no real suggestion of any act done by Mrs. Relfe to sever the joint-tenancy.

(2) See the references in the preceding note.

(3) See the notes to *Perkins v. Baynton*, ante, 1 vol. 118.

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[*] BURT against DENNET.

Lincoln's Inn
Hall, July 8.

(No entry.)

Bill against a trustee who has assigned his trust — the assignee ought to be made a party; as the decree should be first against him, and the trustee to stand as a security.

DENNET, the father of the defendant, was trustee in a mortgage-deed from Godfrey to Burtenshaw, by which an annuity of 30*l.* per annum was secured to the plaintiff. Dennet dying, the trust descended upon the defendant, who was his heir at law and personal representative; and the defendant having transactions with Burtenshaw, assigned the mortgage to him, without the plaintiff's privity, and afterwards assigned his property to trustees for payment of his debts. Burtenshaw paid the plaintiff her annuity down to 1784, but then, the payments being stopped, the plaintiff filed this bill against Dennet.

The Lord Chancellor said, — The plaintiff ought to have made Burtenshaw

Burtenshaw and the assignees of *Dennet's* estate parties, by which she might have gotten the mortgage-deeds: he then should have decreed *Burtenshaw* to have paid the annuity, and *Dennet* to stand as a security, for having broken the trust.

The matter was compromised.

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BURT
against
DENNET,

CURRY against PILE.

(Reg. Lib. 1786. A. fol. 760.)

Lincoln's Inn
Hall, July 10.

JOHN WALSH, by his will, dated the 2d of August 1758, devised as follows:—"I give to her (*Elizabeth Curry's*) son, *John Curry*, 1000*l.* when he arrives at the age of twenty-one years, the interest of which to be paid to his mother till he arrives to the age of ten years; and then I desire my executors will take him and put him to a proper school for his education, and when he arrives at that age, I desire they will expend out of my estate 100*l.* a-year till he arrives at the age of twenty-one years; and then I give him 5000*l.*"

A larger legacy being given after a less, to the same legatee, in the same will, the legatee decreed to take both. (1)

The question was, whether *John Curry* should take both the legacies, or only one.

[*] *Mr. Madocks* (for the plaintiffs) cited the fourth case, put in *Mr. Justice Aston's* argument, in *Hooley v. Hatton*. (2) "As to a larger sum after a less, where they are in the same instrument, the two sums are not blended, but the legatee has two legacies; and the heir must shew that the one was meant to be blended with the other, the presumption being in favour of what is written." *v. ante*, vol. i. p. 390. note. (2)

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No counsel were heard on the other side.

Lord Chancellor decreed for the plaintiffs.

(1) See 1 *Roper on Legacies*, 491, &c.; and see the notes to *Ridges v. Morrison*, *antea*, 1 vol. 389, &c.

(2) *Hooley v. Hatton*, *antea*, 1 vol. 390. note, and 2 *Dick*. 491. See the observations on it, 3 *Ves*. 292, 293, 294. 465, 466. and 5 *Ves*. 381.

PIERSON against GARNET.

(Reg. Lib. 1786. B. fol. 553.)

[*Vide S. C.*
antea, 58.]

Lincoln's Inn
Hall, July 13.

A PPEAL from the decree of the Master of the *Rolls*, in this cause, pronounced the 6th of March, 1786, (*vide ante*, p. 38.) on the point, whether the terms used in the will were recommendatory only, or imperative, and raised a trust for the descendants of *Ann Coppinger*.

The words, "it is my dying request," in a will, raise a trust. (1)

Mr. Ambler (in support of the appeal).—Upon hearing the cause at the *Rolls*, his Honor was of opinion, that *Peter Pierson* is not, at present, absolutely entitled to the personal property of the testator. The appellant contends, that his Honor ought to have declared him absolutely entitled.

The question is merely, whether the words before the Court amount, in their natural sense, to a recommendation, or whether they are im-

(1) See the various references, *antea*, 38. especially *Harland v. Trigg*, and *Wynne v. Hastings*, *antea*, 1 vol. 142. 179. *Pushman v. Füller*, 3 *Ves*. 9. and *Morice v. Bp. Durham*, 10 *Ves*. 536, &c.

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perative? If they are imperative, they must create a trust. In the mind of any person, not in the profession, there could not be a doubt on the construction; the only doubt arises from a prejudice occasioned by the edicts of the *Roman* law, and from some cases in our law. The decree is not to be supported on sound principles. His Honor did not himself think it so; for he said, it was what the civilians call a duty of imperfect obligation; but thought himself bound by authorities. The *Roman* law did not allow these devises, otherwise than as trusts, which arose from a practice which prevailed, by which persons were drawn in to give legacies upon false pretences; therefore, the *Roman* law said, that the will of *A.* could not be the will of *B.* but in our law it stands the other way,—it may [*] be so. In the *Roman* law, they were all trusts, in our law they are not so; the cases of the *Roman* law therefore ought to be laid out of the question. In the *Digest*, L. 30. t. l. l. 115. & 118. *de verbis precariis*, the words are, “*cupio des, opto des, credo te daturum, exigo, desidero uti des.*” These legacies, considered as such, were held captious, but were valid as trusts; the *Roman* law ought, therefore, not to be acted upon, as it proceeded on the rule, that the will of *A.* could not be the will of *B.*—I shall consider, therefore, what is the law of this Court. 1st. What is the natural sense of the words? 2dly, Whether the testator has used them in any other sense? 3dly, If so, whether his intention can take effect? and 4thly, I shall enquire into the cases which have been determined. 1st. The words are not in their own nature imperative. A request implies a power not to comply. In this it differs from a requisition: the word, *dying*, being added to *request*, does not vary its nature as a request, although it makes it more earnest. It is only a means of converting it into a trust, if the legatee has a mind so to do. It is said, these words may be imperative, and if they are so, they must raise a trust. I allow there are cases in which they may be imperative, but contend they are not so here. Words of request to an executor, or to a trustee, are imperative; so they are in the execution of a power: but these are the only instances. In *Cloudesly v. Pelham*, 1 Vern. 411. the testator devised his personal estate to his executor, *willing him to pay his debts*; the Court held, that the devise being appointed executor, the request was imperative. So in the case of a power, in *Vernon v. Vernon*, the 21st of November, 1787, before Sir Joseph Jekyll, where *B. Vernon*, having a power to make a jointure, covenanted before marriage, in consideration of his wife's fortune, to execute his power, and appointed certain farms for that purpose. Afterwards, finding that the farms would sink in value, after the expiration of the then leases, so as not to be equal to the jointure covenanted for, he made his will, and thereby *earnestly requested* that his son would make up the wife's jointure 500*l.* a-year. The question was, whether the son was bound? *Cloudesly v. Pelham*, was cited, and also a case of *Mason v. Lindsay*, where Lord Talbot had decided very differently. The Master of the *Rolls* said, the covenant would have bound the testator's lands. Here *Vernon* had only a power. All parties intended the power to be executed to its utmost extent; but the method they [*] made use of deceived them. As *Vernon* might have directed the execution of the trust, the will was only ancillary to the settlement. He therefore decreed the son to be bound. Thus far the cases go, but no farther; and the reason is obvious. But it is said, that the object and the persons are in this case certain, [and that it was so considered in *Harland v. Trigg*. In answer, I say, certainly if the fund and the person are necessary to give effect to any, the plainest bequest; but do not give a meaning to words of request which they would not have if the funds and person were uncertain.

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certain. The intention is the same in both cases. (2)] The next question is, Whether the Bishop meant to make it a trust, and if he did, whether that intent can be effectuated. If he meant it as a trust, he might have used proper words. He created a trust in *Salt*, to pay the annuities, and when they were paid, there was to be an end of the trust; therefore, if he did not create a trust for this purpose it was not for want of knowing how to create a trust. It is strange, if having first created a trust, he should afterwards be content with implying a trust from improper words, if he intended any trust to exist. The Court will not understand his will, so as to make him act inconsistently. It is only a trust, in case *Pierson* should die without children. If he meant a trust, he certainly would have made it apply whether he had children or not. He seems anxious to give his property to *Peter Pierson*; it is inconsistent to give it him in such a way that he will have no power of creating a jointure for a wife. If *Peter Pierson* has children, he takes the property absolutely; can a trust then arise from his having no children? But the testator, in fact, has shewn no intention of raising any trust whatsoever. Who are the persons to take? All the descendants of *Ann Coppinger*, persons whom the testator did not know. How can the trust, if created, be executed? — It is impossible. It is too uncertain who are the persons. The trust is impracticable. The uncertainty of it is apparent. It is so loose that it cannot be executed. The words, *relation* and *family*, are as certain as the word *descendants*. Why does the court in the anonymous case, 1 Williams, 327, [and in *Edy v. Salisbury*, 24th April 1740, (5)] say, that under the term, *relations*, none shall take but those who are within the statute of distribution; but from the objects becoming too numerous under a larger construction? So in *Crossley v. † Clare*, the 10th of April 1761, [*] where the devise was held good, in consequence of the restriction, “living near *Sevenoaks*, in *Kent*,” and the reason given why it, otherwise, would have been bad, that it might be endless. In the present case there are fifty-two descendants of *Ann Coppinger*, before the court. — So of the word, *family*, that has been held so uncertain as not to raise a trust. *Harland v. Trigg*, ante, vol. i. p. 142, the present case is full as uncertain: there may be five hundred descendants of *Ann Coppinger*, at the time of Mr. *Pierson*'s death. It is uncertain also, who are to take; whether those descendants who shall be alive at the death of Mr. *Pierson*, or those who were alive at the death of the testator. The trust must not be executed in such a way as to be elusory: it therefore will not be sufficient to give each descendant something: — but he cannot discover who are entitled. If he gives the whole to one, except 1s. each, to such as may appear to be descendants, it will be no execution of the trust. The impracticability of answering the trust, stands on the same argument: how is it to be done? If it should devolve upon the court, how can the court execute it? How shall they examine into the circumstances, who should take more, and who less? — Suppose the devise had been to give it to the descendants of a remote an-

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† *Crossley v. Clare* [Ambler, 397.] — Testator devised his real estate to be sold, and the money to be divided between the descendants of his uncle Thomas Ince, now living in or about *Sevenoaks*, in *Kent*, or hereafter residing in any part of *England*. Sir Thomas *Clarke* said, if the word, *descendants*, had stood alone, it would have been equivalent to *heirs*, but that the other words shewed plainly the intent of the testator, and, therefore, all the persons coming within the description, must take a share, and decreed the money to be paid among the children and grand-children, but a great grand-child, born after the date of the will, was decreed not to take.

(2) This part is substituted in Mr. Brown's copy for the words, “but the object being certain, does not create a trust in that case.”

(3) From Mr. Brown's copy.

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cestor; it would have been utterly impracticable; it is not much less so here: the testator could, therefore, never mean it, and if he did, his intention cannot be performed. The gift is to *Peter Pierson*, his executors, administrators, and assigns; the limitation afterwards is mere blunder: like that in the will of Dr. *Chandler*, Bishop of *Durham*, where he gave the lands to be purchased by the money arising from some of his securities, to *Richard Cavendish* for life, and afterwards gave the same to him in fee, (*vide Leslie v. the Duke of Devonshire, ante, p. 187.*) Here the testator meant to give the absolute property to *Peter Pierson*. 3dly, With respect to the cases which have been determined. — In the case of *Bland v. Bland*, Lord *Hardwicke* said, that the words were not sufficiently strong to raise a trust. Words of request, might leave the subject in the discretion of the party. The words “*so much as he should die seised of;*” shewed Sir *John Bland* might dispose of what he pleased. The case came very [*] near the *Attorney General v. Hall*. There was no power given to Sir *John Bland* but what flowed from his interest, therefore it was no trust. In the *Attorney General v. Hall*, Fitz. 314, the court held the limitation over void; that the power to dispose of the whole resulted from the devisee’s interest. In the present case, as in that, there is nothing left; it is like a remainder after a gift in fee. His Honor admitted *Cunliffe v. Cunliffe* to be against his decree; but said, the Lords Commissioners, in delivering their opinion, rested upon *Bland v. Bland*, and *Pynsent v. Pynsent*. The Lords Commissioners, in that case, referred to *Bland v. Bland*, and to the Earl of *Kinnoul v. the Duke of Bedford*, where the devise was held not to raise a trust. In *Cunliffe v. Cunliffe*, the sugar-house was not given for any definite time; so that there was great ground, from that circumstance, to argue that it was meant only for life: here the devise is to *Peter Pierson*, his executors, administrators, and assigns, which repels that argument. His Honor thought *Bland v. Bland* no authority; and therefore, that *Cunliffe v. Cunliffe*, being founded upon it, was not. But I do not know any case, on the other side, that such words will create a trust, though they will operate upon a trust when created. *Harding v. Glyn*, 1 Atk. 469, is incorrectly reported; the court only determined that it was a limited power. In the Duke of *Marlborough v. Lord Godolphin*, in 1753, the codicil was, “my further will is, that the legacy to my dear wife shall be for her life only, then to be distributed as she by deed or will shall direct.” Lord *Hardwicke* said, it was as strong a power as could possibly be given.

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Lord *Chancellor* (without hearing counsel in support of the decree). — I see no great reason to doubt the propriety of the rule laid down by the *Master of the Rolls*. Where the object and the person are both certain, the rule must be adhered to. The only question in *Cunliffe v. Cunliffe*, was, whether it fell within the rule. Where the words “*peto, rogo, opto, des;*” &c. occur, they make a designation of the object, and the property must be applied according to that designation. In this case, the devisee only takes an estate for life in the produce of the fund. The intention of the testator was, that, if he had children, he should take an absolute power of disposal; if not, it should go to the descendants of his aunt. If the word used had been *relations* [*] it would go to those within the statute of distribution; but, under these words, it will go only to such relations as are descendants, which is still more limited. The decree is right; for the devisee may obtain an absolute power, and then there will be an end to it.

Decree affirmed.

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HILL *against* CHAPMAN.

(No Entry.)

Lincoln's Inn
Hall, July 13.

ANSFIELD moved, that an order of reference to the Master, in consideration of a proper allowance to an infant, should be varied, by which the allowance to be from *Christmas* last, instead of from the reference. He stated, that the father of the infant was only on half-pay, and could not maintain the infant.

No allowance to a parent for maintaining an infant, for the time past. (1)

niel consented.

Lord Chancellor said, — The maintenance never can be from the father. It is the duty of the father to maintain his child, and the father cannot be so ordered as to pay him for maintaining the infant in time. The Master, if he sees the pressure of the parent's circumstances, may consider it in the rate of the allowance, but cannot vary the allowance for the time past. (1)

Motion refused.

It has, however, long been settled to the contrary (see 6 Ves. 425. 454.); and the court will not only allow maintenance for the time past in a proper case, for it will at all, but will dispense with any reference as to the father's ability, where it is reasonably evident, or where there is a great disproportion between the large maintenance of the infant, and his father's circumstances. See the note to *Hughes v. Hughes*, 587.

COOPER *against* DOUGLAS.

(Reg. Lib. 1786. A. fol. 608.)

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Lincoln's Inn
Hall, July 13.

MELLY, by his will, made in the year 1766, gave the sum of £4000 to trustees, in trust, to lay out the [*] same in *South Sea* annuities, to apply the same as therein mentioned. He then gave his cousin *Susannah Douglas*, (now *Susannah Cooper*, and a widow with her husband,) to be paid to her within three months after her death, provided she should marry with consent of *Archibald Douglas* her father. If she should not marry with such consent, it was to be paid to the persons claiming the former £4000. and until marriage, the interest, at the rate of 3 per cent. to be paid to *Susannah Douglas*. The testatrix appointed [*Mellory Wind*] executrix.

Legacy left to A. on marrying with consent, and till marriage interest to be paid at 3 per cent.

In 1767, [*Mellory Wind*] (2) laid out the £4000. in the purchase of *South Sea* stock, and conveyed the same to trustees, in trust to pay *Susannah Douglas* £4000. with interest at the rate of 3l. per cent. per annum, the surplus interest to the executrix.

The executrix lays it out in the funds, and conveys to trustees in trust to pay the legacy, with 3 per cent. interest, and to pay the surplus interest to her.

[*Mellory Wind*] afterwards intermarried with *Thomas Blunt*, and, after his death, with the Rev. *John Gibbons*, the original defendant. She died the 10th June 1780, having by her will made the said *John Douglas* her executor and residuary legatee.]

This is not a good appropriation, and the stock having sunk in

value, the executrix's estate shall make it good. (1)

See *reg. v. Askew*, ante, 58. and 1 Cox, 241. S. C. *Green v. Pigot*, 1 vol. 103. See also the notes, especially *Burgess v. Robinson*, 3 Merivale, 9, 10. The variations and additions between brackets are Mr. Brown's corrections in his

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Susannah Douglas afterwards intermarrying with the co-plaintiff *Cooper*, and the stock purchased turning out not to be equal in value to 4000*l.* they filed the present bill, stating the marriage, and a settlement previous to it, and that the stock purchased was not equal in value to the legacy; and praying that *Gibbons*, the husband [and representative] of the executrix [*Mellory Wind*] might transfer to the trustees in the settlement, to the uses thereof [the said 4487*l.* 17*s.* Bank annuities, and for an account of and to be paid] the difference between the present value of the stock purchased and the 4000*l.* legacy.

[In 1783 *John Gibbons* died, and the cause was revived against his representatives.]

The cause came on to be heard in the year 1784. The question was, whether the laying out the money in the funds, and conveying the same to trustees for the benefit of *Susannah Douglas*, the legatee, was a valid appropriation, binding upon the plaintiffs; when it was decreed, that the stock purchased should be transferred to the [accountant-general in trust in the cause,] in part [satisfaction of the legacy of 4000*l.*] and it was referred to the master to [take an account] what would remain due to the plaintiffs after such transfer, [for principal and interest of the said legacy.]

The Master made a report, and the cause came on upon further directions, when it stood over, in order that it might be reheard on the point of the validity of the appropriation.

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[*] Mr. *Mansfield* and Mr. *Mitford* (for the defendants) now contended, that the legacy was laid out by the executrix in the same manner that the court would have ordered it to be, if there had been a suit; that it was invested at the price stocks bore at the day, and a declaration of trust made, without any fraud; and that, in the witnessing part of the deed, it was expressly transferred "to, for, and upon the trust declared in *Kelly's* will;" that being thus irrevocably placed in the hands of the trustees to those uses, whatever might happen to be the event, the stock was become the property of *Susannah Douglas*, and she must abide its rise or fall, as she would, had the appropriation been made by the court, as in the case of *Green v. Pigot*, (*ante*, vol. i. 103.) and that it would be peculiarly hard in the present case to throw the loss upon the estate of [*Mellory Wind*] the executrix, who had done what was right in performance of the trust reposed in her.

Lord Chancellor. — The question is, whether the legacy was taken out of the testator's property. The uses declared by the deed are expressly to pay the legatee 4000*l.* with interest at 3*l.* per cent. and to pay the residue of the interest to the executrix. If a legatee has the legacy anticipated, he must stand or fall by it; but then he must have the whole sum. When the court appropriates a legacy, it orders a sum equal to it to be laid out; but I do not remember any case, in which the court has done so, and given any part of the intermediate interest to another person. The executrix could not take the surplus interest.

The money must remain in court, subject to the application of the parties; and it must be referred to the Master to enquire into the settlement, and to whom it shall be paid.

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STRATTON against BEST.

(Reg. Lib. 1786. B. fol. 593. b.)

*Lincoln's Inn
Hall, July 14.*

E-HEARING of] a decree made by the Lord Chancellor, the 26th of February 1783.

petition of re-hearing was very long, stated several deeds and wills, asked several questions, but the only material one, [*] and which now received any decision, the others being waved on the part of the appellant, or acceded to on the parts of the respondents, arose on the settlement upon the marriage of *William Light*, the appellant's grandfather with *Susannah Broderip*, his grandmother, dated the 11th and 12th of October 1738, whereby *William Light* conveyed to trustees, and assigns, one moiety of his manor of *Baglake*, and other premises, in the following uses, viz. to the use of himself till the marriage take place; and from and after the solemnization thereof, in order to permit him and his assigns to take the rents and profits for 99 years if he should so long live; and after his decease, to permit his widow to take the rents and profits for life, for her jointure, and in default of dower; "and after the decease of the survivor of them, upon order to permit and suffer *all and every the child and children* of the said *William Light*, begotten on the body of the said *Susannah Broderip*, to take the rents, issues, and profits of the said premises, to them and their heirs for ever, *in such shares and proportions as should be directed by the said William Light, by his will, duly executed in the presence of two or more witnesses, or by any other deed or writing, signed and attested in the presence of two or more witnesses, should direct, limit, or direct; and for want thereof, in trust, to permit and suffer all and every the child and children, so to be begotten as aforesaid, to receive the rents, issues, and profits of the said premises, to them and their heirs for ever; but in case there should be no child or children of the said marriage, or in case such child or children shall be all dead at the death of the survivor of them the said William Light and Susannah his wife, then in trust, for the heirs and assigns of the said William Light for ever."*

There were issue of the marriage *John Light* (the eldest son, since deceased) and several other children, only three of whom survived *William Light* and *Susannah Light*, viz. the defendant *Henrietta Harriotta Best*, plaintiff *Hester Eleanor Stratton*, and *William Light*, the appellant's father, who was born after the settlor's decease.

The settlor made his will, dated the 2d of January 1747, and also a second will, dated the 19th of March 1747, by which he gave [*] his manor-house at *Baglake* to his wife for life, but neither by his will, or by his writing, made any appointment as to the shares his children were to take in the premises at *Baglake*, in the events that afterwards happened.

The question before the court, upon the former hearing of the cause, was whether, under the settlement of 1738, *Henrietta Harriotta Best*, *Eleanor Stratton*, and *William Light*, took as tenants in common, or joint-tenants; when the Lord Chancellor declared, that, according to the true construction of that settlement, the estates comprised in the said settlement were to be considered as settled on the children of the mar-

Settlement to permit "all and every the children to take the rents, &c. to them and their heirs for ever;" they are joint-tenants, not tenants in common. (1)

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(1) See the note to *Perkins v. Baynton*, ante, 1 vol. 118.

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riage in joint-tenancy, subject to the power of appointment by will, which was declared not to be executed by the will of the settlor.

William Light, the posthumous son of the settlor, being dead since the decree, intestate, leaving the appellant, his only son and heir at law, he, thinking himself aggrieved by the decree, presented his petition of re-hearing to the Lord Chancellor.

The case was argued in *Easter* term.

Mr. Mitford and Mr. Luders (for the appellant, *William Stratton Dundas Light*). — The original bill insisted, that the plaintiff *Hester Eleanor Stratton*, the plaintiff *William Light* (the defendant's late father,) and the defendant *Henrietta Harriotta Best*, as the surviving children of *William Light* the father, were entitled, as joint-tenants in fee-simple under the marriage-settlement, to the manor of *Baglake*; and the decree having declared them to be so entitled, the appellant is aggrieved thereby.

When the cause originally came on, the first question arising upon the settlement was whether the children, in default of any appointment by *Light* the father, took estates as joint-tenants, or as tenants in common. The estates are conveyed to trustees, to the use of the father for 99 years, if he should so long live, remainder to the wife for life, remainder to "permit and suffer all and every the child and children of the marriage to receive the rents, &c. to them and their heirs for ever, in [*] such shares and proportions as *William Light* should by will or deed appoint." It is certainly clear, under this clause, the father had no power to appoint the estates, but only the shares the children were to take. "And for want thereof, to permit all and every such child or children to receive or take the rents, &c. to them and their heirs for ever." The decree has determined that the children took in joint-tenancy, not tenancy in common: we are to argue, that they took as tenants in common; and this we think will appear, by comparing the clause itself with the preceding and subsequent clauses. The subsequent clause is, "In case there should be no child or children of the marriage, or in case such child or children should be all dead without child or children of their bodies to be begotten, living at the decease of the survivor of them the said *William Light* and *Susannah* his wife, then in trust for the heirs and assigns of the said *William Light* for ever." This is inconsistent with the idea of a joint-tenancy. The purpose of the settlement was to make a provision for all the children of the marriage, and it must have been intended to make as beneficial a provision as possible. Under the first clause, they would take as tenants in common. The intention of the second clause was to regulate the proportions, not to turn them into joint-tenants. The estate is first given in shares and proportions; then the father is to regulate their shares; then the settlement directs how the rents and profits are to be paid, if there be no appointment. The second clause makes no new provision. The heirs and assigns of *Light* are not to take till all the children of the marriage were dead without issue: it was therefore intended that the children of a child who should die in the life-time of *Light* or his wife, should be let in to take; and in order to effectuate this purpose, the children must take as tenants in common. One word in the settlement implies this intent very strongly; it is the word *every*, which implies, in a degree, severalty, that each shall take something to him and his heirs for ever; and the same word being repeated in the second clause, where it was unnecessary if they were to take as joint-tenants, shews the intention to be, that the children should take in severalty. The course of recent determinations is against estates in joint-tenancy, and to favour tenancy in common; and the court has taken hold of any words it could for that purpose, wherever it was possible to discern an intention that the estates should be

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common, [*] and not in joint-tenancy. In *Lewin v. Cor*, Cro. 196. the court held a devise to two, and their heirs equally, to be in common. And the intention, if clear, must bind as much in construction of this instrument, as if it was the case of a will. Even at common law, if the intention be clear, though the words are doubtful, it shall take its operation according to the intention, as in *am's case*, 5 Co. 7. From hence I argue, that if the intent was, they should take as tenants in common, they shall take so, although the words were otherwise. But it may be objected, that, although the words in a will may be construed to make a tenancy in common, it cannot in a deed to uses. In *Fisher v. Wigg*, 1 Williams, 14. it is said that deeds to uses are to be construed according to the intent of the parties, so as it be not contrary to law. Mr. Justice Gould, in that case cited 19 H. 6. 74. to prove this; he also cited, 2 Roll. Abr. 67., *as v. Brookes*, and *Smith v. Johnson*; and although in that case of *Wigg*, Lord Chief Justice Holt was of a contrary opinion, yet he has been acted upon and recognized as an authority by Lord Hardwicke in *Rigden v. Vallier*, 2 Ves. 252. In the present case, if there is nothing else to mark the intention, the last clause would correct the preceding words, and give the children a tenancy in common. In *v. Heath*, 2 Atk. 121. the word *respectively* was held sufficient to make a tenancy in common; so in *Blisset v. Cranwell*, Salk. 226., "to be divided" had the same effect. Words which qualify the before given are to be construed according to the intent, *Goodtitle v. Es*, 1 Wils. 341. Another reason why this cannot be a joint-tenancy is, that the estates of joint-tenants must all commence at the same time, which could not be the case here, as the posthumous child does not take at the time the estate vested in the living children, *Basset v. Es*, 3 Atk. 203. A posthumous child can take nothing till his father's death. Deeds, under the statute of uses, are construed as wills, *Shelley's Case*, 1 Coke. In *Boys v. Rowell*, 1 Levinz, 232. a deed of trust to give the profits to three, in equal manner, and then to convey the income in like manner, was held to make a tenancy in common, as if it had been in a will. Ever since the case of *Lennard v. the King*, down to *Bagshaw v. Spencer*, the court has been able to find the intent of the party in the construction [*] of trusts, in favour is still more to be expected in the construction of marriages, *Ellison v. Airey*, 1 Ves. 111. This was a general provision; it is impossible a posthumous son should be intended to be excluded; he must, therefore, be supposed to be within the provision as in *Miller v. Turner*, 1 Ves. 85. In *Rigden v. Vallier*, the principle is laid down; there, in a deed in consideration of natural affection, lands were given to two daughters and their heirs for ever equally to be divided between them, and it was held that they should take as tenants in common, from the nature of the provision by a father to his children. The most favourable construction will always prevail, in construction of equity, for children taking as purchasers under a marriage settlement.

Morris and Mr. *Scott* (for the plaintiffs) Mr. and Mrs. *Stratton*. *Mansfield* and Mr. *Graham* (for the defendants) Mr. and Mrs. — First, with respect to the point of joint-tenancy. — The objection from the word *every* is of no avail; that word is used in all cases of joint-tenancies are raised; supposing the words giving a power of appointment, had even been express, as tenants in common not as joint-tenants, that would not have affected the clause upon which the question is raised for the former clause never operated, the father having made no appointment, the will not operating as one; it therefore came to the point of the last clause: "and for want thereof, to permit all, and every such child

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child and children, to take the rents, &c. to them and their heirs for ever,* not in shares and proportions, not equally to be divided, or accompanied by any words to make a tenancy in common; without such modification, the words, *ex vi terminorum*, carry a joint-tenancy, which is the old estate, known to the law: tenancy in common has been only introduced to serve the intent of testators. — The cases cited are all upon wills, not upon deeds. In the case of formal deeds, they have always been considered as formed upon sufficient deliberation, and not open to the construction of intent as in the cases of wills, and of the declarations of uses of copyholds, (which have so lately been considered as taking the construction of wills, that the first case of the kind is in Wilson,) where for the purpose of preserving the intention of the parties, the words “equally” “to be divided” have been construed to raise a tenancy [*] in common. When the court, on the other side, have considered deeds to uses, as taking the construction of wills, they have rested upon a doctrine which has been long exploded. There is not a doubt, that a gift to A. with remainder to the heir of the body of A. in such a deed, would now not make the heir take as a purchaser. But it would be very doubtful, whether the words used in the settlement, even if in a will, would make a tenancy in common. If they, in the first clause, had stopped at heirs for ever, without introducing the power of appointment, the children must have taken as joint-tenants. That throws out the argument of its being a marriage-settlement, providing for all the children. But it is contended, that, whatever construction arose upon that part, the subsequent clause will make a tenancy in common. The subsequent clause has precisely the same limitation as if there was no power of appointment. It is contended, the intention could not be to make them joint-tenants, because a child might have died, leaving a child, and the estate might have survived among the other children; but it might equally be contended, that, if a child died before he could sever the jointure, it was intended he should not take his share from his brothers and sisters. The objection from the estates vesting at different times, is equally unfounded. They take at once; the child in *ventre sa mere* is in the same situation, as to the vesting of the estate, as a child born. It is the common acceptance and daily practice, that these words, without more, will not make a tenancy in common, and it is therefore recommended in the *Touchstone*, and by Mr. Justice *Blackstone*, to insert the words, “as tenants in common, and not as joint-tenants,” wherever that is the intention.

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Mr. *Mitford* in reply. — The intention of the parties is to be considered throughout in the construction of these deeds, and, from the whole, the intention is perfectly clear. The distinction between conveyances at common law, and conveyances to uses, is taken in *Sammes's case* 13 Coke, 54. and, though it has been asserted, that the position, that deeds to uses are to be construed as wills, is exploded, yet it is not so; for Lord *Hardwicke* in *Rigden v. Vallier* has expressly said the distinction subsists with respect to words of regulation or modification of the estate, though not to words of limitation; so that the words, *all* [*] *and every*, and *equally to be divided*, would still create estates in common. The estate was meant not to go over whilst there should be a child of any of the immediate takers; that could not be unless there was a descendible interest, otherwise it would depend only on the survivor dying, leaving or not leaving a child.

Lord *Chancellor*. — The executory devise over to the heirs of the father was to take place when all the children were dead without leaving any child; therefore, if A took, and died leaving children; B. took, and died also leaving children; C. took, and died without child; the children of A. and B. must take before the heirs of the father. The description
of

of the settlement is that it neither provides for, nor excludes, the children of children, during the interval from the death of the survivor, till the executory devise takes place. The question is, whether the giving the estate this way can be supported; and whether deeds to uses, in the nature of wills, should be construed so widely as wills have been. I should be sorry to give into this, for I think no good has been done by the wide construction of wills.

It stood over to amend the pleadings.

The cause came on again at *Lincoln's Inn Hall*, on *Saturday* the 14th of *July*, when the Lord Chancellor said, that whether the settlement was to be considered as the conveyance of a legal estate, or a deed to uses, would make no difference, and that the vesting at different times would not prevent its being a joint-tenancy (2); he therefore continued of his former opinion. Decree affirmed.

(2) "*Dubois v. Dubois*, and *Sedgwick v. Dubois*, 29th April and 22d June 1729. — "Power in settlement to appoint to use of children of marriage, in such proportions as for such estates, and in such manner, &c. Father appointed by will, to all his children born and to be born, and to the survivor of them and their heirs. Children entitled by will as joint-tenants. In *Elliot v. Jekyll*, and *Williams v. Jekyll*, 2 Ves. 691. [694.] limitation to issue as purchasers; they take as joint tenants." — From Lord Redcote's notes.

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against
BEST.

[*] CUNNINGHAM against WEGG and Others.

(Reg. Lib. 1786. A. fol. 621, 622.)

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*Lincoln's Inn
Hall*, July 16.
and 17.

BILI., by a member of *Gray's Inn*, against the treasurer, benchers, and steward of the Inn, for an account of monies paid for the renewal of grants of chambers, and that the society might be decreed to renew the plaintiff's term in several sets of chambers.

The plaintiff stated, that upon his first purchasing the chambers, the defendant *Adams*, the steward of the Inn, assured him the terms should be renewed from eight years to eight years, upon payment of certain fines; that, notwithstanding this, the benchers had made pension-orders, that persons not renewing within a certain time should pay additional fines; that he had tendered the former fines, which had been refused (2); he, therefore, prayed the society might be decreed to renew.

The defendants pleaded, that there are four law societies (enumerating them), one of which is called *Gray's Inn*; and stated it to be a voluntary society, governed by benchers, who make rules for the regulation of the society, and the letting, &c. of the chambers, subject to an appeal, in case of disputes, to the Lord Chancellor and the twelve Judges.

Mr. Attorney General and Mr. Lloyd (in support of the plea). — The societies for the study of the law are mere private voluntary societies, regulated by their respective benchers, and not liable to account in this court. Where two members have a dispute between themselves, the

A bill will not lie against the benchers of an Inn of Court, relative to the renewal of a grant of chambers. (1) Plea allowed. (1)

(1) Mr. Beames, in his *Elem. of Pleas in Equity*, p. 78. refers to *Rakestraw v. Brewer*, 2 P. W. 511. *Sel. Ca. Ch.* 55. and *Mosel*. 189. *Rex v. Gray's Inn*, Doug. 353. and *Wyatt's Prac. Reg.* 269. The plea in the principal case is accurately stated in substance above; and it is set out at length as a precedent in Mr. Beames' work, Appendix, p. 325.

(2) And he alleged that the benchers, or some of them, directed him, if he thought himself aggrieved, to seek his remedy in the Court of Chancery; and ordered their solicitor to send the plaintiff the names of the several benchers of the society. To these allegations the defendants put in an answer. *Vide Beames's Elem. Pleas*, 328. See as to the point intended by these statements, 2 P. W. 511, 512. and in the argument at 506.

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benchers are the proper forum to decide it. Where the dispute is between the society and a member, the appeal is to the twelve Judges. There is no instance of any of the courts interfering, either with respect to calling to the bar, or the interior government of the society; on the contrary, the courts have always refused to interfere, 1 Keble, 135.— *Boorman's case*, March, 177.— 2 Williams, 511.— *Hart's case*, Dougl. 340.

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Mr. Mansfield, Mr. Scott, and Mr. Richards (for the plaintiff). — This plea cannot be good as a plea to the jurisdiction: it avoids the jurisdiction of this court, without pointing out [*] another forum; for it appears that, in all questions, the first forum is the bench itself, and there is an appeal, only, to the Judges, who have no original jurisdiction. The cases, so far from shewing that the courts will not entertain a jurisdiction, rather prove that they will. In the case in Keble, some of the students had taken possession of the chambers by violence; the Court put the benchers into possession; and then told the students, they might go to the domestic forum. In the case in March, it was an application for a mandamus: it was refused, because there was nobody to whom the writ could be directed. *Rakestraw v. Brewer*, in Williams, proceeds on a strange ground, that the benchers had referred the parties to the court of equity. (3) It is true, in matters of discipline, the bench is the proper forum; so, in colleges, the society regulates all matters of discipline, but, in matters of property, the ordinary jurisdiction takes place. In the law societies, and particularly in *Gray's Inn*, many of the chambers are freehold. This bears no resemblance to rooms in the universities; they must be subject to the ordinary jurisdiction. It is impossible to go to the Judges: how should they decide upon the rights of individuals? and, if they decide, how can they enforce the execution of their sentence? What officer have they, in the present case, to take the account? What remedy can they apply, if they should think the plaintiff entitled to have his money returned; can they take the defendant's goods in execution? It is impossible they should exercise the jurisdiction. The plea ought to point out a competent forum; and, not having done so, it must be over-ruled.

Lord Chancellor. — It is a good plea. There is no instance of a suit, either relative to the discipline, or the property of chambers, in an Inn of Court. The defendants say, as far as they have acted, they are liable to the jurisdiction of the Judges. It is a claim among persons having privilege; therefore, this is not the proper jurisdiction.

Plea allowed.

(3) See the preceding note.

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[*] STONE against THEED and Others.

(Reg. Lib. 1786. B. fol. 689.)

Lincoln's Inn
Hull, July 17

A. having given
his real, lease-
hold and per-
sonal property,

(which leasehold was bishop's leases, renewable,) as a general fund, charged with annuities to trustees, to pay rents and profits to B. for life, with remainder to the plaintiff; the fines for renewing the leases (which he directed should be renewed) are to be paid out of the whole fund, not apportioned between the tenant for life and the remainder-woman. (1)

CHARLES WODNOTH, by his will, dated the 20th of May 1786, devised (after payment of debts, &c.) to the defendants Theed and

(1) See note (1) in the next page.

Bor,

Box, their executors, &c. all his real estate in *Thornborough*, in the county of *Bucks*, and his third part of divers messuages, lands, and hereditaments in the parish of *Westbury*, in the county of *Somerset*, called *Westbury Park*, held by lease for lives under the Bishop of *Bath and Wells*, and all benefit of renewal of such lease, and all his other real estate whatsoever, and the remainder of his personal estate, in trust, that they, and the survivor, and the heirs, executors, &c. should, out of the rents and profits of the said premises, and out of the interest and produce of his personal estate, pay to the defendant *Serena Wodnoth*, widow of his late brother *Edward Wodnoth*, an annuity of 30*l.* a-year during her life, and in trust to pay the rents and profits of the same premises, and the interest and produce of his said personal estate, to his sister *Ann Wodnoth* during her life, and, at her death, in trust, to pay an annuity of 100*l.* to his niece, the defendant *Bridget Wodnoth*, for her life, but if she married *Thomas Milburn*, then residing at the town of *Buckingham*, then he revoked the said annuity.

And upon further trust, that the said *Theed* and *Box*, and the survivor, should pay the remainder of the rents and profits of his said real estates, and the interest and produce of his personal estate, to the child or children (if more than one) lawfully begotten of his said niece *Bridget Wodnoth*, for their support and maintenance during the minority of such child or children, at their discretion, and to convey the said real estates, and pay the principal of his said personal estate, to such child or children (if more than one) equally, if only one to such only child, when they should attain their age of twenty-one years; and in case the said *Bridget Wodnoth* should have no child or children lawfully begotten, or if such child or children should die before the age of twenty-one years, without leaving any child or children lawfully begotten, in such case in trust to convey the aforesaid lands and premises, and pay his personal estate to the plaintiff *Catharine Lowndes Stone*, or, if she was dead, to her children equally, [*] and if only one, to such only child; and he directed that his said trustees, or the survivor, &c. should, from time to time, renew the lease, and add new lives to his estate at *Westbury Park*, if they could obtain such lease. And he likewise empowered his said trustees to place out at interest the overplus of the rents of his real and leasehold estates, and his personal estate, in government or real securities, and to change and transfer the same in such manner as they, or the survivor, &c. should approve. And he appointed the said *Theed* and *Box* executors, and gave them 150*l.* each for their trouble.

In *Hilary* term 1784, the plaintiffs filed their bill against all the defendants except *Giles*, stating the will of the testator *Charles Wodnoth*, and that he died in *February* 1778 — That the said defendants *Theed* and *Box* had proved the same in the prerogative court of *Canterbury* — That *Ann Wodnoth*, the testator's sister, died in *August* 1780, having made her will, and appointed the defendants *Methold* and *Theed* joint-executors, who proved the same — That on the death of the said *Ann Wodnoth*, the plaintiff *Stone* became entitled to the residue of the real and personal estate of the testator, subject to the charges and contingencies in the said will. The bill then prayed (amongst other things) that the will of the testator *Charles Wodnoth* might be declared to be well proved and established; and that, in case any of the persons on whose lives the said renewable leases were held were dead, or should die, that the defendants *Theed* and *Box* might insert a new life or lives, with

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(1) See the notes to *Pickering v. Vowles*, *antea*, 1 vol. 199. *White v. White*, 4 Ves. 24. 5 Ves. 554. and affirmed on appeal, (with an additional direction,) 9 Ves. 554, &c. and Lord *Eldon's* judgment, *ibid.* particularly 557, 558. *Et vide* Lord *Montfort v. Lord Cadogan*, 17 Ves. 485. and *Allan v. Backhouse*, 2 Ves. & Beames, 65.

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against
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the approbation of the Master, and that the expence thereof should be paid out of the testator's estate.

On the 25th of November 1784, the cause came on at the *Rolls*, when his Honor declared the will to be established, and referred it to the Master to take the proper accounts, and ordered a sufficient part of the personal estate to be set aside for payment of the annuities; and it being alleged that one of the lives in the lease had dropped since the testator's death, and that a new life had been added, it was ordered that the Master should enquire what fine was paid on that occasion, and whether the payment of such fine, and the other expences of the renewal, was a proper disbursement by the executors.

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[*] In October 1786, *Bridget Wodnoth* died without issue.

On the 8th of February 1787, the Master reported he had taken the account directed; and, among other things, he reported, that on the 17th of May 1780, *William Hutton* died; and the defendants *Theed* and *Box* did, on the 27th of January 1781, pay for the fine on the renewal of the leasehold estate, by inserting a new life in the room of *Hutton*; the sum of 222*l.* 17*s.* 10*d.*

Bowles, another of the lives, had dropped in the summer 1786; but the lease not being renewed, by the addition of another life, till the 2d of March 1787, the fine on that occasion could not appear in the report.

And the cause now coming on for further directions, the question was, out of what fund the fine, and other expences of the two renewals, should be paid.

Mr. *Scott* and Mr. *Osgood* contended (for the plaintiff) that the testator had in this case provided a fund, out of which the fines for the renewals ought to be paid; that having directed his trustees to renew the leases, and afterwards to place out at interest the surplus of the rents of his real and leasehold estates, he meant that the fines to be paid upon the renewals should, in the first place, be a charge on that accumulated fund. The cases on contribution proceed upon the circumstance of no fund being pointed out; there the usual mode in which the parties taking have been directed to contribute, has been, that the tenant for life should pay one-third, and the remainder-man the other two-thirds, *Rowell v. Walley*, 2 Ch. Rep. 218. *Ballet v. Spranger*, Pre. in Ch. 62. *Cornish v. Mew*, 1 Ch. Ca. 271. The Lords Commissioners, *Maynard*, *Keck*, and *Rawlinson*, afterwards varied the rule, but the Court afterwards reverted to it again, although, in *Verney v. Verney*, 1 Vesey, 430. Lord *Hardwicke* observed, that Lord *Macclesfield* said, it was putting too low a value upon the life-estate. In that case, Lord *Hardwicke* went into a train of arguments to support a probable intention, in the testator, how the fine should be raised, which is unnecessary in this case, the testator having; in fact, charged it on the fund of which 66*l.* are now lying in the trustees' hands, out of which sum these fines ought to be paid.

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[*] Mr. *Hardinge* and Mr. *Graham* (for the defendants).—The question is, whether the expence of the fines shall fall upon the estate for life, exclusive of the remainder. As a general question, it is of great importance, as no case hitherto has been determined, whether the first, or an intermediate, estate shall be charged, without the reversion bearing its proportion of the burthen. A gross inconvenience would arise on the other side, as the estate of the tenant for life might be reduced to nothing in favour of a remainder-man, certainly not more a favourite of the settlor, as the estate for life is generally given as a provision for a parent or a wife, and the remainder-man, frequently, is an absolute stranger. The testator's intent, in such a case, cannot be, that the estate of the first may be rendered nugatory, in order to effectuate that of the latter. It is said the rents are the natural fund, out of which the

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Trustee.

uses for renewal are to come; but this is, certainly, not so, if it is said with reference to the estate for life. What is the principle upon which contribution proceeds? That it is for the benefit of all the takers of the estate, that the leases shall be renewed. If, then, the benefit is to rise to all, the *onus* must fall upon all. But, against this, it is urged, that the tenant for life is under no necessity to renew; and then they say, the contribution is a reward for his having renewed. All this supposes a real difference between the testator's having expressly directed renewal, or not having done so. To which we may answer, what Lord Hardwicke has observed in *Verney v. Verney*, that the intent of the testator, always, is that the leases shall be renewed. In that case, there was no express direction that the leases should be renewed; but Lord Hardwicke imposed it, and applied the rule of contribution. The doctrine was not new; the same thing had been done in *Lock v. Lock*; 1 Vern. 666. There is no case in the books, where a refusal on the part of the tenant for life has been held justifiable; nor has any difference ever been taken, where the renewal has been by the direction of the testator, or by the consent of the tenant for life; the same rule of equity applies in both cases. In *Graham v. Lord Londonderry*, in 1746; a leasehold estate having been settled, by marriage-articles, on the countess, who was one of the lives in the lease, two renewals took place in her life-time; she refused to contribute towards the fines: the Court executed the settlement, and declared that, the leases having been renewed, one-third of the expence [*] should be borne by the tenant for life, the other two thirds by the remainder-man. The question has been treated as if the rule had been overturned by the case of *Nightingale v. Lawson* (*ante*, vol. i. p. 440.). The determination there, only, was that the person renewing shall be upon fair terms with the remainder-man. The rule there laid down assists in settling the proportion between the parties. The analogy is very easily drawn between estates for lives and estates for years. If it was the case of a mortgage, the tenant for life would pay the interest, the remainder-man the principal. As, in *Nightingale v. Lawson*, the value of the estates were taken as the rule of contribution, so the Master, in this case, may take the sum paid as the value, then that the tenant for life lived so many years, therefore from thence he may draw the proportions.

Lord Chancellor. — This is a gift to trustees, of three different funds, — a freehold estate, leasehold premises, and a personal estate, — to pay an annuity of 30*l.* a-year (&c. as before stated). No disposition is made of the accumulation. The question before the Court turns upon the words “I direct that my trustees shall, from time to time, renew the lease, and add new lives to my estate of *Westbury Park*, if they can obtain such lease;” and his having made the lease subject to the trusts. A beneficial enjoyment of the lease was intended to the several lives in succession. The first question is, whether this provision is for the purpose of the original trust, or for any other; and, if so, to what degree, and in what proportion; and there is nothing in the will to diminish the unlimited trust. I must consider the thing bequeathed to be the subsisting lease, subject to renewal. Suppose this were the case of an estate, to which an embankment was necessary in order to protect the estate: there could be no doubt that it was a clear indication that the first trust was to keep the estate productive, by embankment or other buildings; or, in the present case, by a very strict analogy, by keeping the leases renewed. I think the terms of the will bind the trustees to apply the funds of the estate for that purpose. 2dly, The next question is, whether the testator can be understood to have made a provision which might exhaust the estate of the first taker. The argument upon this part of the case is a fair argument, as to the construction of the will.

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The testator's expressions are as strong as if he had said, expressly, he meant the lease to be kept up; [*] he must be understood to sacrifice the intent of a provision for the first taker, to the original intent of keeping up the estate. Where an estate of limited duration is given to one for life, the intent is, to give him whatever it shall produce during his life; and, in that case, unless there are strong expressions to shew an intention, the Court cannot compel him to renew. But, where such a tenant has renewed, there the Court has said, that, the estate given him being, from its nature, capable of renewal, the tenant for life, in renewing for his own use, would be making an unconscientious benefit of the estate. The case of *Rumford Market* is the first and most notorious case on this subject. The Court, therefore, thought of an apportionment, and that so much as the tenant for life took for himself, he should pay for; so much as he took for the benefit of another, he should be paid for by that other. The division which the Court originally made of the burthen was found to be arithmetically wrong, though the principle, that it should be borne in proportions, was right. Therefore I thought it necessary, in the case before me, that the proportion should follow the benefit (2); but that all turns upon the tenant for life not being suffered to take an advantage. (2) In the present case, no advantage could be taken. The question then is, out of what fund it is to be paid. The whole is made a general fund. The whole is one trust, and the trustees are to use the whole estate according to the will. The whole fund (the rents and profits, the personal estate not being productive) must pay the expences of the trust. The produce of the whole must be first paid to the purpose of the renewals.

(2) See *Pickering v. Fowles*, *antea*, 1 vol. 198, 199. and the note. *Nightingale v. Lamson*, *ibid.* 440, &c. with the notes, 9 Ves. 557, 558, 559. 2 Ves. & Beames, 65. 17 Ves. 485, &c.

LUTWYCH against WINFORD.

(No Entry.)

Lincoln's Inn
Hall, July 18.

It is no objection on the part of a purchaser of land, sold by a master, that more land is sold than is necessary for the purposes of the testator's will. (1)

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WILLIAM LUTWYCH, Esq. by will, devised all his manors, &c. to his brother *Charles Lutwych*, his heirs and assigns for ever, charged with the payment of several annuities and legacies. *Charles Lutwych* died in the life-time of the testator, who dying, in 1773, without issue, and without altering his will, his estates descended, subject to charges, to his three sisters, *Elizabeth Lutwych*, spinster, *Ann Fazacherly*, widow, and *Sarah Winford*, widow, as his co-heirs.

[*] *Elizabeth Lutwych* being so seised of an undivided third part of the said manors, &c. the 21st of December 1773, made her will, and thereby devised her third part of the manors aforesaid, to *George Powel*, and *John Beardsworth*, and their heirs, charged with a third part of the mortgages and debts of her said late brother, and with such incumbrances, which then did, or might, at the time of her death, affect the same, to the use of her sister *Ann Fazacherly* for life; remainder to the same trustees, to preserve contingent remainders; remainder to the plaintiff, *William Lutwych*, for life, with several remainders over. And she thereby declared her mind to be, that, if at any time thereafter, and before the debts, mortgages, or other incumbrances, charged upon or affect-

(1) See note (1) to *Prideaux v. Prideaux*, *antea*, 1 vol. 287. referring to 2 Ves. jun. 53. Et vide *Holme v. Stanley*, 8 Ves. 2. and *Idoyd v. Johns*, 9 Ves. 65, 66.

ing

ing her said estates, should be paid off, discharged, and satisfied, it should be thought necessary to sell and dispose of all or any part of her said real estates, it should be lawful for the said trustees, with the consent and approbation of the said William Lutwyck, during his life, &c. to sell all or any part of her said estates. She died the 21st of June 1776, without revoking her said will.

Ann Fazackerly, on or about the 11th of July 1776, made her will, and thereby devised all her undivided third part of the same manors, &c. to the same trustees, chargeable with their proportions of the said incumbrances, and thereby declared her will to be, that if the trustees should, at any time after her decease, find it necessary, or think it advisable to raise by sale or mortgage of all or any part of her said estates, any sum of money for the purpose of paying off and discharging all or any part of the mortgages or incumbrances affecting the said estates, it should be lawful for them (with the consent of the persons who should be entitled to the possession of the estates) so to do; and declared the trusts of the money so to be raised, *ultra* what should be necessary for paying the proportion of the incumbrances. Ann Fazackerly died about the 18th day of the same month of July, 1776.

A bill having been filed, a decree was pronounced, that the incumbrances should be discharged by sale of the estates, or a sufficient part thereof; but all the parties apprehending that it would be for the benefit of themselves, and of those who might be interested in the estates, that the whole should be sold, the estates were divided into twenty-seven lots, and sold upon [*] three days, nine lots in each day. On the first day's sale, Mr. Thomas Cooper was the best bidder for all the lots (except No. 3.) and on the second and third day's sale, he was also the best bidder for other lots. Afterwards, by order of the 27th of February 1786, he was discharged from his purchase, and the estate ordered to be re-sold. At the re-sale, Bartlet Goodrick, Esq. was the best bidder for lot 1. at 9250*l.* and reported as such, which report was confirmed, and an abstract of the title laid before the Master. In the mean while, the purchases of the other lots having been confirmed, and so much of the purchase-money paid in, as, with the personal estate of William Lutwyck, was more than was sufficient to pay the incumbrances; Mr. Goodrick objected that circumstance to the validity of the title, insisting, before the Master, that more money having been raised, by the first sale, than was sufficient, the powers given to the trustees in the respective wills, did not enable them to sell any further parts of the estates. The Master reported the above facts, and particularly that Sarah Winford, who was seised in fee of one-third of the premises, consented to the sale of the whole estate, and the parties interested were anxious that the whole should be sold, because part of lot 1. is an old mansion-house, which the devisee, being tenant for life, could not pull down, and the supporting of which was attended with a greater expence than the owner could bear. He reported, that the money paid in for the lots sold, amounted to 23,238*l.* 19*s.* 6*d.* to which being added 4,326*l.* 8*s.* 9*d.* the amount of the personal estate, produced 27,565*l.* 8*s.* 3*d.* which made a surplus of 6000*l.* more than was necessary to pay the incumbrances, and that, upon considering the matters stated, and the discretionary power given to the trustees, and that the whole estate was sold by the consent of the parties, and being of opinion, that the mansion-house is too large in proportion to the estate remaining unsold, he conceived a good title could be made. To this report the purchaser took an exception, insisting, that, under the circumstances of the case, a good title could not be made to lot 1. which came on to be argued this day.

Mr. Scott and Mr. Richards (for the purchaser) objected, that the re-sale was not authorised by the decree. The discretionary power given

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to the trustees to sell, by *Elizabeth Lutwyck's* will, is only if it should be necessary, *before debts and incumbrances* [*] paid, — it is larger in *Mrs. Fazackerly's* will. The purchaser, although desirous of completing his purchase, is apprehensive that, under the circumstances of the case, a good title cannot be made, a great deal more of the estate having been sold than was necessary for the purposes of the wills. The sums paid in upon the lots where the purchases were confirmed amount to 6000*l.* more than sufficient to pay the incumbrances; so that although there was an order for a re-sale, all the purposes of the sale being more than answered, the order should not have been made, but a stop put to the sale of any more of the estate.

Lord Chancellor. — The Court has decreed a sale of the estates. The first objection taken is, that the decree has gone too far in ordering the whole to be sold, whereas a part only ought to be sold. (2) If the decree be wrong it cannot be gone into in this manner. It cannot appear but that it was right to sell the whole. If the decree had been, that the Master should sell *Greenacre*, and he had sold *Blackacre*, the objection might be good, but it cannot hold unless it can be carried to that height. I think if the Master, in selling the whole, has consulted the convenience of the estate, he has acted right. The charges were paramount the wills. The power given to the trustees was to sell the whole, or such part as might be expedient. The Court has decreed in the same way, and the Master, with the consent of the parties interested, has sold the whole: a purchaser cannot come in to object to it. (2) If the parties to the suit had objected, that their interest was affected, by more being sold than was necessary, I should think I ought to take notice of it, as it would be an ill use of the Master's discretion; but here it is probably for the purpose of making it more productive.

Exception over-ruled.

(2) See note (1) to *Prideaux v. Prideaux*, 1 vol. 287.

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Lincoln's Inn
Hall, July 21.

Commissioners making different returns, a new commission ordered; but the defendants should not have excepted, but moved to suppress the returns (1), the deposit therefore ordered to be paid to the plaintiff.

[*] CORBET against DAVENANT.

(Reg. Lib. 1786. A. fol. 593.)

A COMMISSION having issued, to four commissioners to make partition, two of them made one return, and the two others another perfectly different, and awarding different parcels to the parties. The defendants took exceptions to both the returns. Upon the exceptions coming on to be argued, Mr. *Mansfield* objected, that the cause could not go on, as the Court could not prefer one return to the other.

Lord Chancellor refused to proceed, and ordered a new commission to issue; but said, the defendants should not have excepted to the returns, but moved to have them suppressed, and therefore ordered (2) the deposit to be paid to the plaintiff.

(1) See accordingly *Watson v. D. of Northumberland*, 11 Ves. 153. and upon the principal case, *ibid.* 159. per Lord Eldon C.

(2) Both the returns were ordered to be quashed, &c. Reg. Lib.

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COOKSON *against* ELLISON.

THE plaintiff made a party defendant, who was merely a witness to a conversation [with her late husband and testator relative to the fortune of his daughter, the defendant's wife], and might have been examined as such, and therefore might have demurred to the bill. (1) The defendant put in an answer, and not having satisfied the plaintiff as to one interrogatory, [viz whether, if any promise was made by the testator, he did not in the course of the conversation retract the same (2)], the plaintiff took an exception, and the Master reported the answer sufficient. Upon exceptions to the Master's report, it was objected, that the defendant need not have answered at all, but might have availed himself by demurrer or plea.

Lord Chancellor said, as the defendant had submitted to answer, he could not enter into the question, whether a demurrer or plea would have been allowed; that the practice of making a mere witness a party, was extremely wrong, and that he should have encouraged a plea or demurrer, had it come on in that shape; but that where a party submits to answer, he must answer fully, and therefore the question being such as would be clearly relevant if put to a party properly before the Court, he must allow the exception. (4)

[Vide S. C. post. 307. 3 vol. 61. 1 Ves. jun. 100. and 2 Cox, 220.]

Lincoln's Inn Hall, July 21. It is no answer on exceptions, that the defendant is a mere witness, and ought not to have been made a party, for, having submitted to answer, he must answer fully. (3)

(1) Or might plead if the objection did not appear on the face of the bill. See Beames on Pleas, 131 and 256.

(2) This is an addition of Mr. Brown in his own copy.

(3) Though Sir L. Kenyon, M. R., was of a different opinion in *Newman v. Godfrey*, post 332. and held, that a mere witness, who being made a defendant thought proper to put in an answer, should not be held to answer throughout, having already given more information in that way than he could otherwise have been compelled to do; yet Lord Thurlow's decision seems the more sound, and has been approved by Lord Eldon C. See in *Fenton v. Hughes*, 7 Ves. 288, 289 and *Baker v. Mellish*, 11 Ves. 75, 76, &c.

(4) The exception was allowed, "so far as related to the second exception taken by the plaintiff to the defendant S. Buck's answer, as he was required to answer 'whether the testator did not in the course of such treaty withdraw or retract such promise or engagement.'" As to the rest, it was over-ruled; and the deposit was divided. Reg. Lib.

[*] CREUZE *against* The Bishop of LONDON and Others.

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MITCHEL *against* HUNTER and Others.

(Reg. Lib. 1786. A. fol. 778. b.)

Lincoln's Inn Hall, July 23.

AN exception to the Master's report, by which he approved of a receiver of the rents of the estates of *Charles Orby Hunter*, Esq. because he had approved of Mr. *Pardon*, whereas he ought to have approved of Mr. *Burn*.

Exception to a Master's report of a proper person to be receiver over-ruled; as the

report ought to stand till the party approved is impeached as an improper person. (1)

(1) In confirmation of this decision, see *Thomas v. Dawkin*, post. 3 vol. 508. and more fully 1 Ves. jun. 452. *Garland v. Garland*, 2 Ves. jun. 137. *Bowersbank v. Colasmanu*, 3 Ves. 164. *Wilkins v. Williams*, *ibid.* 588. *Tharpe v. Tharpe*, 12 Ves. 517. *Eggington v. Flavell*, stated from MSS. 2 Madd. Rep. 253. Sir T. Plumer, Vice Ch., adduced all these authorities, after the utmost research, in *Attorney General v. Day*, 2 Madd. Rep. 262, 263. The peculiar circumstances of that case should be noticed. *Vide ibid.* 246, &c.

Three

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Three persons (Mr. *Burn*, Mr. *Woodgate*, and Mr. *Pardon*) had been proposed before the Master. Mr. *Burn* was proposed by the plaintiffs in the first cause, who are holders of annuities, charged by Mr. *Hunter* on his estates, for the lives of himself and his brother-in-law, *Gorges Hamilton*, to the amount of 1425*l.* per annum; by the defendants *Shephard* and his wife, their children and trustees, claimants under another annuitant; by the defendants in the first cause, who are plaintiffs in the second cause, mortgagees of the estates prior to Mr. *Hunter's* coming into possession thereof; by the defendant *Elizabeth Hunter*, the wife of Mr. *Hunter*, who, if she survives him, will be entitled, under the marriage-settlement, to an annuity of 1000*l.* per annum; and by their son, an infant of eleven years old, (by his guardians) tenant in tail (expectant on the death of his father) of the estates. Mr. *Woodgate* was proposed by Mr. *Hunter*, the tenant for life, his mother, and some annuitants, posterior in time to the plaintiffs in the first cause. Mr. *Pardon* by the defendants *Lady Gray*, *William* and *Richard Brickenden*, who had a charge in their own right on the estates, for the sum of 10,000*l.* created by the grandfather of Mr. *Hunter*, who acquired the estate; and *Richard Brickenden* is also surviving trustee in Mr. *Hunter's* marriage-settlement. The only objection made to Mr. *Burn* was, that he was an annuitant, and solicitor in the cause.

The Master approved of Mr. *Pardon*.

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The exception came on to be argued the 16th of *May* last, before his Honor, sitting for the Lord Chancellor; when Mr. [*] *Mansfield* and Mr. *Richards* supported the exception, and contended, that the recommendation of the persons principally interested ought to have prevailed, and the Master ought to have appointed the person recommended by them, especially as Mr. *Burn* had acted for several years as receiver of the estate, during which time he had considerably improved it, and had always accounted to the satisfaction of the Master, as appeared by his report. With respect to Mr. *Burn* being himself an annuitant, he had only purchased, from a grantee of an original annuitant, an annuity of 100*l.* a-year, charged on the estate. In a case of *Dr. Warren v. Davis*, the Master's appointment was set aside; and, as the exception stands not only that the Master has approved Mr. *Pardon*, but that he ought to have approved Mr. *Burn*, the court may appoint Mr. *Burn*, without any further reference to the Master.

Mr. *Selwyn* and Mr. *Stratford* opposed the exception, and insisted that the Master having exercised a discretion lodged in him, his appointment was not subject to further discussion. They mentioned a case of *Lord Cornwallis*, where the parties principally interested recommended Mr. *Vernon*; but the Master having appointed a gentleman resident in the country, the court said, although they knew Mr. *Vernon* to be a very proper person, the Master having exercised his discretion, the court would not interfere.

His Honor said, he did not consider the court as bound by the act of the Master; that he ought to have appointed Mr. *Burn*, but that it would not be right to over-rule the appointment without a further reference, and, therefore, referred it to the Master to review his report, and to state his reasons for approving any particular person to be receiver, and rejecting another.

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The Master made a further report, whereby he stated his reasons for his choice of Mr. *Pardon* to be, "because he was proposed by the said *Lady Gray* and the *Brickendens*, whom he considered as having, in their own right, a prior charge upon the estates for the sum of 10,000*l.* and many years' interest, created by the grandfather of the present Mr. *Charles Orby Hunter*, which grandfather acquired the estate, and made this charge [*] as a provision for his own children; and that *Richard Brickenden* is also the surviving trustee in the marriage-settlement of the present

present Mr. *Hunter*, for the discharge of these and other incumbrances affecting his said estates, and created before his time; and because Mr. *Pardon* is concerned also for Mr. *Crawford* and *Thomas Coutts*; the executors of the late Mr. *Hunter*; and, particularly, because he is not one of the annuitants on the estate himself, nor concerned for any that are so, whose interest it must be to raise, as speedily as possible, out of the said estate, without regard to proper repairs or improvements and by any means whatever, to the injury of the inheritance, the whole of their demands, insomuch as they solely depend on the precarious tenure of the life of the present possessor for payment." Upon these, and further reasons, he continued his approbation of Mr. *Pardon*, and concluded his report by observing, "As the present is the second instance of any contest for a receivership in my office, during the twenty-five years which I have executed it; and the first of any order being made for a special report, but such special reports may become more frequent, I think it my duty to suggest, whether some regard should not be had to the considerable costs thereby occasioned, and some extraordinary directions given for the payment thereof, unless it be thought proper that the same should, in all cases, come out of the estate."

The cause came on now upon the Master's report.

Mr. *Mansfield*, Mr. *Scott*, and Mr. *Ainge* supported the exception, and cited two additional cases on the subject; one of *Shepherd v. Mills*, where the exception was disallowed, because the Master had appointed the person recommended by the parties principally interested; the other of *Hamilton v. Frankland*, in 1752, where the Master's appointment was set aside.

The Lord Chancellor said, — The observation with which the Master had concluded his report, had great weight with him. He thought it would be very injurious to the suitors in the court, that questions of this sort should arise. The good sense of the matter was, that the Master's report and approbation [*] should stand until the person recommended by him was impeached as an improper person; which not being the case here,

The exception was over-ruled.

(2) See the first note to this case.

[*] SITTINGS BEFORE MICHAELMAS TERM.

28 Geo. 3. 1787.

DONNE *against* LEWIS. [31st October and 4th November.]

(Reg. Lib. 1786. A. fol. 793.)

Lincoln's Inn
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THIS cause came on upon further directions.

William Lewis made his will, dated the 18th of June 1785, and shall be applied in exoneration of a devised estate (though under a charge for payment of debts) yet it shall not be so, if the devised estate be expressly pointed out in aid of another fund provided for that purpose. (1)

Although generally a descended estate

(1) See note (1) in the next page.

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thereby

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thereby desired that "all his just debts, funeral expences, and the charges of proving his will, might be paid as soon as convenient after his decease, and gave and bequeathed to his wife, the defendant *Sarah Lewis*, the sum of 200*l.* and also several specific parts of his personal estate. He then devised to the said *Sarah Lewis*, and to *Thomas Lett*, and *Joseph Bushnan*, and the survivor of them, and the heirs, executors, and administrators of such survivor, according to [his (2)] respective estates and interests therein, all his freehold, copyhold, and leasehold estates (not thereafter particularly bequeathed) together with all his ready money and book debts, which should be due and owing to him at the time of his decease, in or upon account of his several trades or employments of a builder and feather merchant, upon trust, that they the said *Sarah Lewis*, *Thomas Lett* and *Joseph Bushnan*, &c. should collect and receive the said book debts, and sell and dispose of his said freehold, copyhold, and leasehold estates, and out of the money arising thereby, pay and discharge all his debts and legacies whatsoever (except the debts secured by mortgage of the estates thereafter specifically bequeathed, which were to be paid and discharged by the devisees of those estates respectively), and in case the money so to be raised by his said [*] trustees, should not be sufficient to discharge the said debts and legacies, then he willed that the deficiency should be charged on the several estates thereafter given and bequeathed to or for the use of his three sons and two daughters respectively, and that one fifth part of such deficiency, with interest thereon, at 5 per cent. from the time of his decease should be paid by each of his said sons and daughters." He then proceeded to devise very fully and particularly to, or in trust for, his five children respectively, five several estates; four of which were leasehold, the other freehold, and three of the leasehold estates were subject to mortgages or other incumbrances: but in case it should be necessary to pay off and discharge the mortgages or other incumbrances upon any part of his estates before the trusts thereby created concerning such estates respectively, should be fully executed and determined, the said testator thereby empowered and directed his said trustees and the survivor of them, and the heirs, executors, and administrators of such survivor as the case might require, to sell and dispose of such respective estates in the best manner they were able, and after payment of all charges, incumbrances, and expences thereon, lay out and invest the residue of the money to arise by such sale in the purchase of government securities, in the name

(1) See *Davies v. Topp*, *antca*, 1 vol. 524. &c. Lord Eldon C. decided, in *Mills v. Slater*, 8 Ves. 295. that "where a will, going beyond a mere charge, creates a particular fund for payment of debts, that fund shall be first applied in exoneration of descended estates, whether acquired after the date of the will, or not. But a mere charge upon a devised estate will not protect an estate descended from being first applied." In the same case, pages 303, 304. Lord Eldon C. says, "It is singular that a will creating a rule of distribution with reference to the present circumstances of the deviser shall be taken to create a rule of distribution which commences afterwards, and which, nine times in ten, he does not contemplate. But upon *Davies v. Topp*, *Donne v. Lewis*, and many other cases, followed by the late case of *Harmood v. Oglander*, (6 Ves. 192, and 8 Ves. 106.) at this day the rule must be considered settled, that, whatever may be the ordinary application, if there be a real fund created for discharge of debts, that will be applied first, when the question arises between the heir and the devisee, either as to estates which the deviser had at the time, or which were acquired afterwards: and authority has gone this length now; that where the heir takes, not by the intention, but by the absence of intention, the deviser is understood as having denoted, in a question between the heir and the devisee, the estate devised shall first go to the debts, though the estate so devised for payment of debts may not be legal assets, and the descended estates may be legal assets; which makes it a strong operation of the trust to throw the debts upon lands which in some cases may be equitable assets, and from lands which may be legal assets."

(2) Reg. Lib.

or names of his said trustees or the survivor of them, or the heirs, executors, or administrators of such survivor, as the case might require, and upon the like uses and trusts as were thereby expressed and declared, of and concerning such estates respectively, or to such of the said uses and trusts as should be then existing and capable of taking effect. And the said testator gave all the rest and residue of his estates, real and personal, of what nature, kind, or quality soever, unto and among all and every his three sons and two daughters in equal proportions, share and share alike; and the said testator made the said *Sarah Lewis, Thomas Lett, and Joseph Bushman*, executors of his will.

This bill was filed by *Francis Thomas Donne* and *Ann* his wife, which *Ann* was the testator's eldest daughter, and *Mary Lewis* and *Thomas Lewis* two other of the children, to have the trusts of the will performed, and for the necessary accounts. The cause came on to be heard before his Honor the Master of the Rolls, who directed the several accounts, and reserved all further directions. The Master made his report, by which [*] it appeared, that the general personal estate, together with the trust fund, consisting of the several leasehold premises, not specifically bequeathed (for in fact the testator had no copyhold estates whatsoever, and no freeholds but those specifically devised) and the ready money and book debts was not nearly sufficient to pay the debts, which amounted to upwards of 5000*l.* besides those specifically charged on the devised estates: and the legacies amounted to near 2000*l.* It also appeared that the testator purchased a small freehold estate after the time of making his will, which was worth about 300*l.* and which therefore descended on *Edward Lewis*, the eldest son and heir at law.

The cause came on now for further directions, and the only point raised, was, Whether the descended estate should be applied in payment of the debts and legacies (there being specialty debts in fact much beyond the amount) in preference to the trust fund devised for that purpose, or before the specific devisees should be called upon for their contribution according to the directions of the will.

Mr. *Scott* and Mr. *Hollist* for the plaintiffs, and Mr. *Cox* for the defendants in the same interest, argued that this was a mere question of construction of the will arising between volunteers: for it did not affect the rights of any creditors, who must at all events be paid. That the question then was, whether any rule of construction had been established in cases of this nature, as to the meaning of the testator, when he made a provision for the payment of debts, that is, whether he should be considered as giving an absolute direction out of what fund such payment should come, or merely as arranging the property he had at the time of making the will, without any view of exempting or favouring any property he acquired afterwards. That *Davies v. Topp* (2), before Lord *Thurlow* on appeal from the Rolls, [12] July 1780, had established this, that a testator shall [*] never be supposed to intend to charge an estate which he actually devises by his will as a bounty, in favour of property which he had not at the time, and which consequently he could not have in view. That *Davies v. Topp* had founded [*] itself on the authority of *Galton v. Hancock*, 2 Atk. 424. *et seq.* and the same thing had been determined in † *Wride v. Clark*, at the Rolls in 1766. That, according to

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† *Wride* against *Clark*. — *John Clark*, D. D. seized of real, and possessed of personal estate, made his will, dated the 5th of May 1757, and thereby directed "that all his just debts should be paid, and charged all his estate real and personal, with the

(2) *Antea*, 1 vol. 524. *Quod, vide*, and see in *Milnes v. Slater*, 8 Ves. 303. and the Editor's notes, (1) and (5) to the principal case.

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to these cases, the inference to be drawn is no more than that the testator is anxiously providing funds for the payment of creditors, but is not to be carried to the extent of an intention to favour after-purchased property. That the circumstances of this case would not be sufficient to exempt personal estate, for it is decided that, whether the fund provided be in the shape of a mere charge, or a term created for payment of debts, yet none of these modes of providing for creditors shall be sufficient to exempt personal estate, unless it be coupled with express words, or necessary implication, to that effect. Now, if in the case of personal estate, the inference is only that the testator has it in contemplation to provide, in all events, for his creditors, and no ulterior intention is to be inferred; why shall the same form of words raise such ulterior intention as to the real estate descended? If, however, no such rule of construction can be established, and each case is to rest on its own particular circumstances; as the present is a strong case to charge the descended estate, as the general scheme of the will was to make an equal distribution of the property among the five children, which equality seemed to be particularly attended to by the testator, from the several directions given by him in his will respecting the incumbrances on the devised estates; and that equality would be considerably incroached upon by suffering one of the five [*] children, in his character of heir at law, to take an additional estate of the value of 300*l.* beyond the bounty measured out to him by the testator.

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Mr. Fonblanque for Edward Lewis, the heir at law, argued that the plaintiffs were bound to raise the question as between the descended estate, and the trust fund specifically bequeathed for payment of debts and legacies; for the testator had expressly declared, *that the deficiency of that fund should be supplied by the contribution of the five children*; and therefore, as to this point, they must be taken as one fund. In respect to the cases decided, he rested principally on *Corbet v. Powis*, 3 Atk. 556.

Lord Chancellor. — I have been furnished with a note of the case of *Davies v. Topp* (3), by his Honor the Master of the Rolls, and I find the first observation made by the Court in that case was, that it was difficult to distinguish it from the case of *Galton v. Hancock*. Now, if it were a recent case, I should not perfectly agree that that ought to be the distinction which appears to have been taken in *Davies v. Topp*, and also in *Wride v. Clark*, between a general charge created by the general introductory words of the will, and a charge created by the most express and specific words that can possibly be made use of for subjecting property to the payment of debts. It is a reasoning extremely subtle, to say that, where a will is sufficiently expressive of an intention to charge the estate devised, yet, you are not to give to that implication all the consequences that you would attribute to a provision for payment of debts actually in-

payment of the same, and subject thereto, he devised all his real estate to his wife in fee, and appointed her sole executrix. The testator died 12th of July 1763, without revoking or altering his will. The widow proved the will, entered upon the devised premises, and sold a part thereof for payment of debts.

At the time of making the will, the testator was seised in fee of freehold and copyhold lands in the counties of York and Essex. He afterwards purchased other lands in the county of York, of which he died seised, and which descended upon the defendant *Ashton*, his heir at law.

The debts of the testator exceeding the personal estate, on a bill filed by creditors, the decree at the Rolls was, that after application of the personal fund, the descended estate should be applied previous to the devised estate in satisfaction of the debts.

The point does not appear to have been raised by the pleadings.

(3) *Vide antea*, 1 vol. 524.

serted in the will. It was with reference to this, that I said I did not know how to distinguish *Davies v. Topp* from *Galton v. Hancock*, and also from *Powis v. Corbet*. The next observation I remark in the note of *Davies v. Topp*, is a distinction between the case of an estate in the possession of the testator at the time of making the devise, but which he suffers to descend to his heir, and the case of a newly-acquired estate, — but this circumstance is not substantial enough to raise a distinction in a case where you must hold the subject matter as a thing quite out of the scope of the testator's intention, perfectly beside and independent of it: when you say *that*, you can say nothing more of an estate [*] acquired by the testator afterwards. Then comes an observation, in the note I have in my hand, that it is very unfit to have on the records of the court, contradictory decisions on similar points; and *on that line only* the court went in affirming the decree. The rule, as there stated, respecting the order of affecting assets is this: 1st. that the general personal estate is to be applied. 2dly, ordinarily speaking, estates devised for the payment of debts. 3dly, estates descended. 4thly, estates specifically devised, even though they are *generally charged with the payment of debts*. This was my idea of the order in which assets were to be applied, and so it continues to be. There are some propositions perfectly clear. It is true, that where the real estate is charged, and there is no express declaration or clear inference to be drawn (which the Court has in many instances been very fond of raising) to save the personal estate for some particular use, the personal estate must be first applied. (4) For a long while this court has been in possession of this idea of applying the personal estate in payment of debts directly affecting the real. This Court held it reasonable to interpose against the stream of remedy afforded by the common law. If the creditor did not act conformably to this, the Court would marshal the assets accordingly. But you all remember how very late it was when the difference was settled between the *hæres factus* and the *hæres natus*. In truth, it was never settled till Lord *Fulbot's* time, and from that time it was so much forgot or so little understood, that Lord *Hardwicke*, in the first argument of *Galton v. Hancock*, was of a directly opposite opinion. He afterwards changed his mind; and on these grounds, that the remedy was against the heir only before the Statute of Fraudulent Devises. 2dly, That by the statute no difference was made between the heir and devisee, and that the fraud provided for was only such as went to defeat the creditor. The next topic of argument was, that when a specific devise was made to *A. B.* the testator strongly expressed his intention of bounty to that devisee to the whole extent of the subject: on these principles he decided that the estate descended should be applied in the *third* place, according to the order of application above-mentioned. But there was another point raised in *Galton v. Hancock*, between the heir and devisee, where there was a general charge of debts. If the reasoning used there had been strictly pursued, it would not have done in this case. In fact, Lord *Hardwicke* dwelt much [*] on the hardship on the devisee, the wife. There is great occasion to regret that circumstance, and that the case was not decided on the dry reasoning. However, if it had it would have been beside the case at bar; for no intention could be raised as to an estate not belonging to the testator at the time of the devise. The answer Lord *Hardwicke* has given to the argument on the effect of *this general charge*, has been the foundation of the subsequent cases, namely, that it affords no ulterior inference *beyond that in favour of creditors.* (5)

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(4) See *Hale v. Cor*, *postea*, 3 vol. 322.

(5) See note (5) in the next page.

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I am very sorry for it ; for it would have left the reason of the law on this point more compleat and clear, and would have answered the ends of justice better, if he had said that wherever an estate is given, or charged, for the purpose of paying debts it should answer that purpose in all events. But the rule has been settled otherwise, and that the bare charge will not do. Soon after came the case of *Powis v. Corbet* before Lord Hardwicke himself, and it cannot be supposed that case was decided without a view to a case so recently determined as *Galton v. Hancock* had been. And yet in *Powis v. Corbet*, the rule is positively laid down ; that was the case of a particular charge. The question, then, will always be this, and the only one that can reconcile all the cases : are the terms of the will only a general indication that the testator means to subject his property to his debts, and not to be a knave (as many of the cases treat the man who does not) ; or does he mean more, and to make a particular provision for the purpose ? (6) The case of *Davies v. Topp* follows the case of *Wride v. Clark*, and carries the idea of the charge being only for the purpose of behaving with common honesty a great way ; for there the testator " charged and made chargeable all his real " and personal estate with the payment of his debts and legacies, and " subject thereto, he devised all his manors of *Whitton* and *Vennington*, " and all his real estates in the counties of *Salop* and *Montgomery*, " in manner therein mentioned. But the will in the present case goes further. It is unnecessary to enlarge on the point of the mortgage debts, for he has provided for the payment of them in so distinct a manner, that even the case of *Serle v. St. Eloy* could never touch this case. They are clear deductions from the property devised. — But the question arises more on the general provision for debts. There are two provisions. — The first is a fund [*] consisting of his ready money and book debts ; and also, some leasehold estates, which very probably was an enumeration of all his personal estate not otherwise specifically disposed of : the next was a contribution from the devisees. The supposed intention to be imputed to the testator, is, that he means to exempt *Whiteacre* when he charges *Blackacre* ; but this cannot be applicable to *Greenacre*, which he had not until afterwards. But the fallacy is, that there is no intention, in fact, either as to *Whiteacre* or *Greenacre*, but only as to *Blackacre*, which he charges : and he leaves both the others quite clear of his intention, which does not apply at all more to *Greenacre* than to *Whiteacre*, he being totally silent as to both. And you must execute his intention as to *Blackacre* : and, if *Blackacre* is not sufficient, the justice of the case

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(5) In *Milnes v. Slater*, 8 Ves. 303. Lord Eldon C. stated, from his own notes, Lord Thurlow's expressions in the principal case to be these : " The true question is, whether " the testator meant only to behave honestly, which is all a general charge imports, or, " whether beyond that honest conduct in creating a general charge for the security of " his creditors, to create also a particular fund for payment of his debts."

Lord Eldon then observed, Lord Thurlow said that was the principle of *Powis v. Corbet*, (3 Atk. 556. ; 3 Ves. jun. 116.) : in which a particular term was raised for the discharge of the debts ; which was held sufficient to warrant the application of the lands comprised in it, before descended estates.

Lord Eldon also, in *Harmood v. Oglunder*, on the appeal, 8 Ves. 116, 117. says, " Lord Thurlow's doctrine upon this point, from his words, which I once took down, " was this : if there is any thing in the will that goes beyond a mere charge, and points " out as particular a mode, as in the case of a term, or a direction for a mortgage or " sale, that is not a mere charge but an intention expressed as particularly in the one " case as the other. Lord Thurlow said he only made the distinction in deference to " those who went before him ; for it amounts merely to this, that if the testator only " declares, he means to be honest, that will not save the descended estate : if he points out " the means, that will save it. Lord Alvanley in the case of *Manning v. Spooner*, " (3 Ves. 114.) does not express Lord Thurlow's opinion as I know it to be upon this " point. He would have destroyed the distinction altogether if he could." See also 8 Ves. 125., and in *Clarke v. Sewell*, 3 Atk. 101.

(6) See the preceding note, *et antea*, 1 vol. 527.

will

will be executed as to creditors, notwithstanding his intention, and only under the common principles of law. Therefore the legacies would not be charged on the descended estate directly; but it must be done, if at all, by circuit. In this point of view then, is there, in this will such an expression of intention, with regard to the devised estates, as to affect a property which the will takes no manner of notice of, or is it a direction how and out of what funds the debts and legacies shall be paid? He directs all the trust fund to be converted into money, and to be applied, &c. and he gives interest at *5l. per cent.* on the legacies from his death, which is beyond the ordinary course of this court, and the intention usually imputed to testators. Having charged these estates specially, it is impossible to execute this purpose without, by consequence, exempting the estate descended. In this view, I take it to be consistent with *Davies v. Topp*, *Wride v. Clark*, *Corbet v. Kynaston*, (*Powis v. Corbet*) and *Galton v. Hancock* (though there was a difference in those cases as to the consequence of those principles) to say that the trust fund must be first applied, and if that is deficient (as it appears to be) then that the devisees must contribute in fifths before the estate descended can be called upon.

In giving the directions, the Lord Chancellor, having directed the Master to compute interest at *5l. per cent.* on the legacies generally, it was suggested that, by the terms of the will, *5l. per cent.* was given only on the deficiency beyond what the trust fund would pay; but his Lordship thought it impossible [*] to impute so strange an intention to the testator: and directed interest at *5l. per cent.* on the legacies generally.

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DONNE
against
LEWIS.

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Ex parte MEAR and WIFE. (1)

Lincoln's Inn
Hall, 5 Nov.
1787.

A COMMISSION of bankrupt issued the 20th of December 1785, against the petitioner the wife of the other petitioner *Mear*, by the name of *Frances* the wife of *Henry Mear* of *Mosely*, in the parish of *Yardley*, in the county of *Warwick*, before her intermarriage known by the name of *Frances Piper*, of *Birmingham*, in the county of *Warwick*, inn-holder.

Commission of bankrupt cannot be against a married woman, upon a trading, &c. prior to marriage. (1)

Frances had before her marriage kept an inn in *Birmingham*, but had declined business on the 20th of December previous to the date of the commission, and on the 14th of February 1785, had intermarried with the other petitioner; and, he being, about the time the commission issued, confined in the *Fleet*, the petitioning creditors prevailed upon the wife to consent to a commission issuing, by promising to settle her affairs, and put her into some eligible line of business: the commission accordingly issued, and she was found a bankrupt.

This was a petition by the husband and wife, that the commission might be superseded, and the bond of the petitioning creditors assigned to the petitioners.

Mr. *Cooke* (for the assignees) contended, that bankruptcy being considered by the law as a crime, a commission might issue against a married woman, and that, the right of the petitioning creditors having accrued to them by the trading, and the act of bankruptcy being before the marriage, she could not afterwards prevent the consequences of them by her own act, namely, the marriage. In an action existing before the marriage, the husband is joined in the next proceeding, and the action then goes on. If the action is commenced after the marriage, the plaintiff may

(1) S. C. *Cooke* Ban. La. 36. (Ed. 5.) But the present case is questioned by Mr. *Christian*, in his work on the Bankrupt Laws, vol. i. p. 71. And see *Ex parte Preston*, Green. 9.

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 {
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 MARR and
 WIFE.

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arrest both. It is necessary, there, to join the husband, because his property is affected, which reason ceases in this case, because the property of the husband will not be affected, but that of the wife only. In a commission of bankrupt it would be impossible to join the husband: it does not appear that he is a trader; so that the commission can only be against the wife.

[*] *Lord Chancellor*.—The creditors of the wife became creditors of the husband. The doctrine of its being a crime is too great a refinement to be followed; all the cases where it has been held, that suits may be supported against married women have been where the husband was abroad, or there was a separate maintenance. — There is nothing in it. Commission superseded.

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[*] *MICHAELMAS TERM.*

28 Geo. 3. 1787.

SHRAPNEL *against* VERNON. }
 LEVICK *against* MORTON. } [14 & 16 Nov.]

(Reg. Lib. 1787. B. fol. 38.)

Tenant in fee, or in tail, in equity, is within the exception in the Annuity Act 17 Geo. 3. as to the necessity of the annuity being registered. (1)

FRANCIS DUFFIELD, Esq. by indentures of the 9th and 10th of *January* 1778, conveyed the equity of redemption of his estates at *Medmendham*, in the county of *Bucks*, then in mortgage to *Jeremiah Crutchley* for a term of years, whereof he was seised in fee, to *John Morton*, Esq. in trust to sell the same and to pay off the mortgage, and a charge of 1000*l.* due to himself, and after payment of the same, to pay such debts as *then were, or should, at the time of the sale, be a charge or lien upon such estates*, and, after payment thereof, to apply the residue of the money to such persons as *Duffield* should appoint. On the 27th of *January* 1778, *Duffield*, in consideration of 700*l.* paid by the defendant *Coles*, granted to him an annuity of 100*l.* for his and his wife's life, which was also secured by a bond, upon which judgment was entered upon the 31st of *January* following. The cause having been heard, and a reference to the Master to take an account of the debts, the defendant *Coles* brought in a claim before the Master for his original sum of 700*l.* as a debt provided for by the trust deed: the Master refused the claim, because it appeared that the bond or indenture *was not duly enrolled* according to the directions of the act of the 17th of his present Majesty, but, by his report, found the deed executed to *Morton*, and that *Morton* was, for two or three years before the execution thereof, in receipt of the rents and profits of the estates as agent to *Duffield*, and continued in receipt thereof, and the tenants continued to pay their rents to him without any particular attornment, and that *Coles* or his agent had no notice of the execution of such [*] deed, but had reason to believe that *Duffield* was seised thereof in fee-simple. *Coles* excepted to the Master's

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(1) This and all other cases in these Reports under the Annuity Act, must be considered as referable to the act of the 17 Geo. 3. c. 26. only. By the late act, 53 Geo. 3. c. 141. the provisions made by the first-mentioned act have been repealed, and other provisions substituted in lieu thereof. In all cases, therefore, subsequent to the above act of the 53 Geo. 3. reference must be to that act alone.

report,

report, and insisted, under the circumstances found thereby, that in a court of equity he was within the clause of the act which enacts, "that nothing in that act should (among other exceptions) extend to any annuity or rent charge, secured upon lands of equal or greater value, whereof the grantor was seised in fee-simple, or in fee-tail in possession, at the time of the grant," or that he was a creditor within the deed of trust, and that the deed ought to be considered as an appointment to answer the said annuity, and therefore, the Master ought to have admitted his claim.

Mr. *Solicitor General* and Mr. *Stainsby*, in support of the exception.

Duffield conveyed the estates to *Morton* in trust to sell and pay such debts as then were or should be a lien upon the estates; the judgment debt and annuity grant come within that description. The exception in the act of parliament, that obviates the necessity of enrolling the conveyance, is where the grantor is seised in fee-simple or fee-tail; but it was objected, that here *Duffield* was neither, he having conveyed the estate to *Morton*. Upon this arises the question, whether *Coles* is not within the exception. The conveyance only being to discharge incumbrances, *Duffield* was seised of the equity of redemption. The intent of the act was to prevent tenants for life from granting annuities, not to prevent persons who had equitable interests. The words in the act could not be meant to be restrained to legal seisin only. The court has in many cases extended the meaning of the word seisin to equitable interests; and possession has been held to be within the scope of the act, as in the Statute of Uses where persons are said to be seised of an Use. The words of the exception, literally taken, will extend to an equitable title. A person equitably seised for life or for a less estate, would be within the restraint of the act, therefore a person equitably seised in fee-simple or in tail must be within the exception. Here is a resulting trust for *Duffield* and his heirs in fee. The most general statutes are extended by this court to equitable purposes. Though at common law a feme covert can make no will; in this court she may [*] make what is tantamount to it. Then, under another head of equity, there was a deception on *Coles*. Any person dealing with *Duffield* must have supposed him to be seised of the estate in fee; *Morton* had been the receiver: there was nothing to shew that there had been a change of ownership; it is stated there was no attornment of the tenants, and it was held out by the agents of *Duffield*, that he was seised of the estate in fee-simple; and, if this deception had not been made use of, *Coles* would certainly not have left it unregistered. The annuity is at present out of the case. He claims only as a creditor by bond and judgment; and the deed of trust operates as an appointment of the residue, which requires no registration. If not so, the deed is void under the statute of *Eliz.* as fraudulent against creditors, and then the whole being void, *Coles* may recover his principal money as a creditor by bond and judgment.

Mr. *Mansfield*, Mr. *Madocks*, and Mr. *Hardinge*, in support of the Master's report. — The question has been treated as if there was a distinction in the act between an annuity for the life of the grantor, and an annuity for the life of the grantee, but the act draws no such distinction: the annuity is therefore void, unless it is within the exception in the act. To be so, it must be charged on lands of equal or greater value, whereof the grantor is seised either in fee, or in tail in possession. It is material under the act, that the seisin shall be of an estate in possession, one of the views of the act being to prevent the grant of annuities out of reversions. — Then, was *Duffield* seised, either in fee, or in tail in possession, of any thing? He was not seised at all, he had only a contingent reversion. If *Coles* had brought an action, and the statute had been pleaded, he would not have replied, that *Duffield* was seised either in fee or in tail.

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tail. It is only where the grantor can command a rent equal or greater than the annuity, that the statute meant the annuity should not be registered. The next objection is, that *Morton* had been in receipt of the rents as agent, and that the tenants did not attorn; but when he received the rents he would receive them under the respective titles he had at the time, and of course after the conveyance under the title he had thereby acquired. With respect to the value of the estate, that must be meant of a value above reprises. The act intended [*] to guard persons who are in extreme imbecility from granting annuities, and therefore it must have been intended that land of equal or greater value should be lands above reprises. But it is further objected in this case, that there was fraud in the representation of *Duffield's* situation. To which it may be answered, that it is not necessary under the act of parliament, that the annuitant who is to enroll should have notice given of the situation of the estate. The exception in the act must be taken strictly, and therefore he must take upon himself the hazard as to the grantor's estate.

Mr. *Solicitor General* in reply. — Under the Statute of Uses, it was held at law, that the *cestui que use* is not seised of the estate but only possessed of it; for although the statute mentioned that he was seised of the use, there could be no legal seisin of an use: yet in this case the *cestui que use* was always considered as being seised.

Lord *Chancellor*. — I am of opinion, that the Master was wrong in not admitting the claim: I think an estate in equity in fee-simple or in fee-tail, is, in this respect, the same as if it was a legal estate. In many acts of parliament, an equitable estate is considered the same as if it were a legal estate; the words *seised in law or equity*, in the qualification act shew, that the word *seised* is applicable to both. I do not fully comprehend the act, as I do not see why the annuity should not be registered as well in the case of a man having a fee-simple or fee-tail, as where he has a less estate. But the act certainly does not say, that it shall be a value above reprises (2); therefore, if there be an estate in fee or tail, though mortgaged for its whole value, it is within the exception of the act. Then it is said, that *Morton* was in receipt of the rents as agent to the owner, and the exception also states the other quality in which he stood, that, under the deed, he took it to pay off the first mortgage, then to pay a debt to himself, then the third use was to pay such debts as were liens on the estate. Beyond that, the use was to the mortgagor (for I consider the whole as three mortgages) not to pay debts generally. I cannot distinguish this from the common case of a mortgage, where the mortgagor continues seised in equity, subject to the charge, and he grants an [*] annuity. The only question is, whether the word *seisin* will extend to being seised of an estate in equity, which, unless I am mistaken in point of law, it will.

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Exception allowed.

(2) By the late act, however, of the 53 Geo. 3. c. 141. It is required that estates so charged should be over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant thereof. sect. 10.

1787.

PHILIPS *against* ATKINSON.

(No Entry.)

Rolls, 13th
Nov. 1787.

THE plaintiff's and defendant's testators were co-partners in trade. A bill being filed for an account of the partnership transaction, a part of the prayer was for a receiver.

The defendant submitted to account, but resisted the appointment of a receiver, as an imputation upon his character, insisting that he was a proper person to receive.

His Honor said, it was not at all so: that where there is a co-partnership there is a confidence between the parties, and if the one dies, the confidence in the other partner remains, and he shall receive; but when both are dead, there is no confidence between the representatives, and, therefore, the court will appoint a receiver.

The cause went to an account.

In a cause for an account of a partnership, both partners being dead, a receiver shall be appointed: *secus* in the case of a surviving partner. (1)

(1) The death of one partner operates, *instantiér*, as a dissolution of the copartnership. See *ex parte Williams*, 11 Ves. 5. *Vuliamy v. Noble*, 3 Merivale, 614. "The representatives of a deceased partner are not strictly partners with the survivor; but that community of interest remains, which is necessary until the affairs are wound up, and which requires, that what was partnership property before, shall remain so for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require. In the case of death it is the equity of the deceased partner, which enables the creditors to bring forward the distribution." *Per Lord Eldon C.* 11 Ves. 5, 6.

It seems that the mere want of notice of a partner's death does not make his estate liable to the debts of the continuing trade: though it is otherwise, if a surviving partner is in the character of executor to the deceased, 3 Meriv. 614. It seems that a Receiver will be granted as between the representative of a deceased partner and a surviving partner, upon exactly the same grounds which would be the foundation for it, as between existing co-partners, *vis.* in a case of waste or of exclusion to the party. See *Oliver v. Hamilton*, 2 Anstruther, 453. *et per Lord Eldon C.* in *Norway v. Rowe*, 19 Ves. 144, 159, 160. The precise point was much argued in a case of *De Tastet v. Borecki*, last day of Michaelmas term, 1805. Though it did not come on again afterwards, Lord Eldon C. so strongly intimated his opinion that the court must interfere if the parties could not agree, that it amounted to a decision of the point as between them, and led, no doubt, to a better understanding. This seems to warrant an opinion that the court might grant a Receiver in a case of such mutual mismanagement as would otherwise be ruinous to the concern, whether appertaining to original partners or otherwise.

WILKINSON *against* BELSHER.

(No Entry on this occasion.)

17th Nov.

MR. Graham moved to amend this bill, by leaving out some of the defendants. He stated that, since the filing of the bill, the plaintiffs had been admitted to sue *in formá pauperis*, and, therefore, that if the bill was dismissed against the defendants it would be without costs.

Mr. Scott objected to the amendment, as the defendants would be out of court, and could not at the hearing apply for their costs, and cited Moseley, 103. to prove that parties shall not be protected by an order to sue *in formá pauperis* from the costs of proceedings previous to the order.

Plaintiff suing *in formá pauperis* shall not amend by leaving out defendants without paying their costs. The affidavit to ground the order to sue *in formá*

pauperis, must be by the party, not by a third person.

Lord

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WILKINSON
against
BELSHER.
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[*] Lord Chancellor refused to make the rule, otherwise than on payment of costs, as paupers ought not to be permitted to harass persons by making them parties, with being liable to pay costs.

The plaintiff was afterwards dispaupered, the order for suing *in forma pauperis* being irregular, as being founded on the affidavit of a third person, not of the plaintiff herself, that she was not worth five pounds.(1)

(1) See Ord. Ch. (*Edward Beames*.) p. 44. as to the antient course, and note 157.

20th Nov.
Master of the
Rolls for Lord
Chancellor.

AKERS against CHANCY. (1)

(Reg. Lib. 1787. A. fol. 80. b.)

[It was at first thought, that a motion for a commission to examine witnesses abroad, must be on affidavit that the matter arose there, or reading sufficient to shew it out of the answer. [But it seems not to be requisite, and the practice is otherwise. (1)]]

MR. *Hollist* moved for a commission to examine witnesses in the *West Indies*, but had no affidavit that the matter in question arose there. His Honor thought such an affidavit necessary. Mr. *Mitford*, as *amicus curiæ*, said if it appeared upon the pleadings to be so, it would be sufficient, and that he had had the same motion granted, by reading sufficient out of the answer to shew the fact to be so: but, the answer not being in Court, the motion stood over for an affidavit of the fact.

(1) The affidavit was merely that the parties could not safely proceed to a hearing without an examination of witnesses, who lived and resided in the *West Indies*. R. L.
See generally, *Newland's Pract.* 119, 120.

Master of the
Rolls for Lord
Chancellor.
20th Nov.

PHILIPS against PHILIPS.

(Reg. Lib. 1787. B. fol. 119. entered *Philips v. Garth*.)

The personal estate given to the next of kin, must be applied in discharge of testator's mortgages (not being expressly exempted) although it will be thereby exhausted.

THE testator having mortgaged his estates, devised the same to plaintiff for life, with remainders over, and then "gave and bequeathed" all the rest and residue of his personal estate to his executors (the defendants) to divide the same among his next of kin, share and share alike." The next of kin insisting that this was a specific bequest to them of the residue, and therefore not liable to the mortgage debts, the executors refused to discharge the mortgages, and the plaintiff, having been obliged to pay the interest, filed this bill for an account of the interest paid, and that the same might be repaid him.

Mr. *Mansfield* (for the plaintiff) stated the case as a bill filed merely to satisfy the doubts of the next of kin.

Mr. *Scott* (for the defendants). — [*] The rule is, that the personal estate is the first fund to discharge debts, unless there is some other fund pointed out by declaration plain. — Here the testator has given real and personal estates, with a residue to the next of kin. If the estates charged originally with the mortgages, are not applied in discharge of them, the next of kin who were intended to take a bounty will take nothing. The case of *Bamfield v. Wyndham*, Pre. Ch. 101. seems tantamount to this case.

His Honor said, the rule of the Court was settled beyond doubt; he could not look for the construction to the state of the residuary which is a fluctuating fund: and decreed an account of the personal estate, which must be applied in a course of administration, and the tenant for life to stand in the place of such creditors, to whom interest had been paid by him.

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1787.

DOBLE against CRIDLAND.

(Reg. Lib. 1787. A. fol. 57. b.)

Master of the
Rolls for Lord
Chancellor.
21st Nov. 1787.

Plea of conveyance, fine and non-claim, not multifarious; but a good plea to a bill impeaching the conveyance as not being for valuable consideration. (1)

THE bill stated, that *John Doble*, late of *Calverleigh*, in the county of *Devon*, being seised in fee of the manor of *Stogumber*, in the county of *Somerset*, by will dated the 13th of *October* 1705, devised the same, in fee, unto *John Doble* of *Crocombe*, and unto his (testator's) name-sake, he that married *William Serle's* sister, and unto *John Doble* of *Bricknoller*, yeoman; that *John Doble* of *Crocombe*, and *John Doble* of *Bricknoller* survived the testator, entered upon their respective shares of the devised estate, and severed the tenancy; that *John Doble* of *Bricknoller* died the 4th day of *February* 1731, leaving a son, *Samuel Doble*, who afterwards died, leaving a son, the plaintiff. It farther stated, that the defendant had gotten into possession of the estate, and of the deeds and writings, and that he pretends that one of the ancestors of the present plaintiff conveyed, by deeds of lease, release, and fine, unto *Henry Vincent*, which conveyance the bill impeached for want of valuable consideration, and as his ancestor did not join in the fine.

To this bill the defendant pleaded, that by indentures of lease and release, dated 18th and 19th of *November* 1707. *John Doble* of *Bricknoller*, plaintiff's grandfather, conveyed to *Henry Vincent* [*] and his heirs, all his moiety of the devised estate, and a fine levied in *Easter* term, 7 Ann, by *John Doble*, and *Catharine* his wife, to said *Henry Vincent*, and that proclamations were duly made, and that *Henry Vincent* entered into possession of the said moiety, and was seised thereof in fee-simple; and that by divers mesne conveyances the said moiety became vested in the defendant in fee-simple, and that he now is in possession thereof, without any entry or claim by plaintiff, or any person or persons claiming under said *John Doble* of the Victualling Office (being *John Doble* of *Bricknoller*) until the filing the plaintiff's bill, being near four-score years, from the time of the conveyance made to the said *Henry Vincent*, except that about 6th of *October* 1763, the defendant was served with the label of a subpoena at the suit of *Samuel Doble*, and thereupon the defendant produced his title deeds to the attorney employed for the said *Samuel Doble*, who was satisfied with such production, and by writing dated 7th of *October* 1763, promised to discontinue the proceedings, and the defendant is informed and believes, that no bill was actually filed to warrant such subpoena: and the plea averred that the conveyance made to *Henry Vincent* was an absolute conveyance in fee-simple, without any provision for redemption or other thing to lessen, alter, or defeat the same. (2)

Mr. *Hollist* (for the plaintiff) contended, that the purport of the bill being to impeach the conveyance, as being without some valuable consideration, and the plea only setting forth the conveyance so impeached without shewing that it was for valuable consideration, the plea was bad, as not meeting the charges of the bill: and that farther, the plea was multifarious, by introducing the matter of non-claim, which was plead-

(1) See per Lord *Thurlow* C. in *Whitbread v. Brockhurst*, ante, 1 vol. 417.; *Else v. Doughty*, 1 P. W. 387. note, and the other authorities referred to by Mr. *Beames*, in his *Elem. Pleas*, 18. note; and *Ross v. Pudsey*, *Finch Rep.* 306. referred to *ibid.* 195. As to these pleas of fine, recovery, &c. see that systematic work, from p. 183. to 197.

(2) The substance of plea, as here given, agrees most accurately with *Reg. Lib.*

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against
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ing a second matter not part of that which constituted the defendant's title.

Mr. *Mitford* supported the plea.

And his Honor said, that the whole was a plea of title; that the non-claim was not a separate fact, but that the conveyance, fine, and non-claim all made one title; the plea therefore was not multifarious, but a good plea; and the same was allowed.

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Lincoln's Inn
Hall, 12th Dec.

In a bill by a second mortgagee to redeem the first mortgage, the mortgagor or his heirs must be before the court. (1) The heir being abroad the court cannot proceed.

[*] *FELL* against *BROWN*.

(No Entry.)

WILLIAM HARRISON the elder, and *William Harrison* the younger (his second son) by surrender, bearing date the 3d of June 1748, conveyed the reversion of copyhold premises at *Walsford* Com. York (after the decease of the said *William Harrison* the elder) to the use of the defendant in fee, subject to the payment of one pound one shilling, to *Richard Harrison* the eldest son of *William Harrison* the elder, and of 50*l.* to *Saville Harrison*, the third son of the said *William Harrison* the elder, and to a proviso for redemption on payment of 90*l.* and interest. And the defendant was admitted tenant to the lord.

The two *Harrisons* afterwards borrowed of the defendant 40*l.* upon bond dated 3d of December 1756, and charged the same upon the mortgaged premises.

William Harrison the younger survived his father, and by will 1st November, 1758, gave to his brother *Saville Harrison* the copyhold estate, subject to the debt of 70*l.* to the defendant.

Saville Harrison being indebted to *Thomas Fell* the plaintiff's testator in the sum of 76*l.* 6*s.* by deed of 20th of November 1758, surrendered the copyhold estate (subject to the former mortgage) to him, in fee, to secure the repayment thereof, and by a deed of even date with the surrender, the uses thereof were declared to be in trust to sell the same, and, in the first place, to pay himself the 76*l.* 6*s.* with interest, and to pay to the said *Saville Harrison*, his heirs, executors, or administrators, the residue of the money which should be produced by such sale. And *Thomas Fell* was admitted to the copyhold premises.

In 1761, the defendant entered into possession of the copyhold estates, and has retained such possession ever since.

Saville Harrison died in 1774, leaving *Richard Everingham Harrison*, of *Baltimore*, in the province of *Maryland*, his eldest nephew and heir at law, being the eldest son of *Richard Harrison* the eldest son of *William Harrison* the elder.

The plaintiff filed this bill against the defendant *Brown* and *Richard*

(1) See this confirmed; and the observations of Sir *W. Grant* M. R.; also upon the principal case in *Palk v. Lord Clinton*, 12 Ves. 48, 58, 59. So also there is a case amongst the notes taken by Lord *Colchester*, of *Stokes v. Clendon*, Rolls, 3d December 1780, which is as follows, viz. "Bill of foreclosure against one of two mortgages for the same loan has not without bringing both before the court, although the mortgages be of different estates. The case was of a principal mortgage and another mortgage of another estate as a collateral security."

"His Honor determined, that a bill of foreclosure against the principal only could not be sustained without making the other mortgagor a party; because the other mortgagor has a right to redeem, and be present at the account, to prevent the burthen ultimately falling on his own estate, or at least falling upon it to a larger amount than the first estate might be sufficient to satisfy."

"Ordered to stand over for want of parties."

Everingham

Everingham Harrison, charging the latter to be abroad [*] in *America*, and praying an account of what was due to the defendant for principal and interest of the 76*l.* 6*s.* and that the defendant might account for the rents and profits of the copyhold estate, and pay to the plaintiff what should appear to be due to him after paying such principal and interest, and in case that should not be sufficient to satisfy plaintiff's demand, that the estate might be sold, and proper parties join for that purpose, and plaintiff be paid out of the purchase-money, and the residue be paid and applied as the Court should direct.

The defendant by his answer acknowledged having continued in possession of the premises, from the year 1761, and said he was ready to account for the rents, &c. to such person as should appear to be entitled to the equity of redemption: but that he did not know who was so entitled, not knowing what was become of *Saville Harrison*, whether he was living or dead, or whether he was ever married or left any child or children living. — He acknowledged having a balance in his hands after payment of the principal and interest of the mortgage of 69*l.* and claimed to be paid a bond given by *William Harrison* the younger for 10*l.* and interest to *Thomas Hadfield*, an assignment of which he had taken from the executrix of the said *Thomas Hadfield*.

Several questions arose: but the only material one was, whether there were proper parties before the court, the supposed heir at law of *Saville Harrison*, the mortgagor, being abroad in *America*, and his personal representative not being before the court.

Mr. *Scott* (for the defendant) made the objection, and urged that, as the heir and personal representative of the mortgagor were both interested in the account, the cause could not go on without them. The account being taken in the absence of the heir who is abroad, will not bind him. A case occurred this morning at the *Rolls*, where a man, after mortgaging his estate died having left all his property by will to his wife and children, who were eight in number; the mortgagee filed a bill to foreclose, and one of the children being abroad, his Honor refused to send it to an account.

Mr. *Mansfield* (for the plaintiff) insisted there were sufficient parties; that *Saville* has the real pledge in his hands, and [*] although there might be a contract between the heir and the executor, that did not affect him. Between first and second mortgagee, it is not necessary to make the mortgagor himself a party, all the decree is redemption of the first mortgage and a conveyance to the second, not an account of rents and profits, unless the mortgagee is in possession. By mortgaging the property a second time, the mortgagor gives to the second mortgagee a power of redeeming the first mortgagee, and neither the mortgagor nor the first mortgagee are hurt by its being unnecessary to make the mortgagor a party to the bill between them; for the first mortgagee is liable to no further account to the original mortgagor, the second mortgagee being bound only to make him just allowances, and, if he has done otherwise, being liable to all charges which might have been made against the first mortgagor in his account with the original mortgagee. If the heir of the first mortgagor was a necessary party, the first mortgagee must keep the second mortgagee out for ever, in all cases where the heir of the first mortgagor cannot be found, or is abroad. In this case the first mortgagee acknowledges he is paid his mortgage-money, and only contends that he has a right to tack the bond, of which he has got an assignment, which he has no right to do; yet from the circumstance of the heir of the mortgagor being abroad, he would hold against every body. — There are many cases in which the Court will act against persons abroad. Although the Court will not establish a will against the heir who is abroad, it will execute the trusts of a will against him. And

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in all cases where the party abroad is a passive party, the Court will go on notwithstanding his absence.

Lord Chancellor.— It seems to me impossible that a second mortgagee should come into this court against the first mortgagee, without making the mortgagor or his heir a party. I admit the distinction has been taken as to proceeding in the absence of parties abroad, between their being active or passive parties, but the principal difficulty is, whether I can call the heir of the mortgagor a passive party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or stand foreclosed. (2) I never remember a case where the decree has not been so perfected: it therefore must be necessary to have the real representative of the [*] mortgagor before the court, though it is not necessary to have his † personal representative. (3)

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It being suggested that the heir was expected to be soon in *England*, Lord Chancellor ordered the cause to stand over.

† As to this point, see 5 P. Wms. 333. n.

(2) *Vide* 12 Ves. 58, 59.

(3) And see *Bradshaw v. Outram*, 13 Ves. 234.

FELL against The Master, &c. of CHRIST'S COLLEGE, Cambridge.

(No entry.)

Lincoln's Inn
Hall, 14th Dec.

A defendant to a bill, though not served with process, may appear gratis and refer it for impertinence.

THE plaintiff filed his bill against the Master, &c. of *Christ's College, Cambridge*, making Messrs. *Wallis* and *Troward* the Solicitors, parties; he served the college with process, but did not serve the defendants *Wallis* and *Troward*. They however appeared gratis, and joined with the college in referring the bill for impertinence.

Mr. *Mansfield* moved that the order of reference so far as the same related to the defendants *Wallis* and *Troward*, should be discharged, on the ground, that they, not having been served with process, could not take any step in the cause. He said, if that was to be permitted, although the principal party in a cause might see no objection to a bill, a party, whom the plaintiff had not brought into court, might refer the bill.

Lord Chancellor.— I have no notion that a party made a defendant to a bill of complaint in this court, may not appear gratis, and get rid of the suit as soon as he can.

Motion refused, and the plaintiff ordered to pay the costs.

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[*Vide* 8. C.
1 Cox, 413.]

After an order that a bill be taken *pro confesso*, merely putting in an answer is not sufficient to set aside the order. (1)

WILLIAMS against THOMPSON and Others.

MR. SCOTT, supported by Mr. *Graham*, moved that an order which had been made for taking the plaintiff's bill *pro confesso*, against the defendant *Thompson*, might be discharged, [*] he having since the order

(1) Upon a motion to discharge an order to take a bill *pro confesso*, upon payment of costs, and an offer to put in an answer, the Court required to see the answer proposed to be put in; which being declined, the bill was taken *pro confesso*. *Hearne v. Ogden*, 11 Ves. 77.

made, put in an answer. They stated that the defendant was an uncertificated bankrupt at variance with his assignees, by which he was prevented from answering sooner; that the plaintiffs replied to the other answers only on the 8th of November, and cited the cases of *Hawkins v. Crook*, 2 Wms, 556. to shew that the plaintiff's bill could not be taken *pro confesso* whilst there is an answer upon the file of the court; also the case of *Abergavenny v. Abergavenny*, 4 Viner, and 2 Eq. Abr. 179. pl. 5.

Mr. *Hollist* opposed the motion; the defendants' answer, which he said was a very long one, not having been accepted by the plaintiff; but offered if he would put in a short answer to waive his order.

Lord *Chancellor* refused the motion; observing, that where the defendant puts in an answer, after the order (2), and the plaintiff takes exceptions to it (2), it is a waiver of the process; because the plaintiff shall not have the benefit both of the defendant's answer and of his own allegations: and that wherever an order is made to take a bill *pro confesso*, if the defendant comes in upon any reasonable ground of indulgence, and pays costs, the Court will attend to his application, if the delay has not been extravagantly long; but where it has been so, the mere gratuitously putting in an answer is not sufficient to over-rule the order.

(2) Mr. *Hollist* (who was of counsel in this case) observed, that what Lord *Thurlow* stated was, that "when the defendant puts in an answer after the order, and the plaintiff accepts the answer, it is a waiver of the process;"—and not as represented *supra*, with regard to exceptions. *Sed vide contra* Mr. *Cox's* report of the principal case, 1 *Cox*, 413.

FRY against PENN and Others.

BILL filed by plaintiff, the builder of some houses at *Dudley* in *Staffordshire*, stating a contract for 800*l.*, but that a committee of the defendants had given directions by parol to his servants, in his absence, for alterations and further erections out of the original plan, and stating his equity to be a want of witnesses to prove such orders, praying a discovery of the orders, and extra-work, and to be paid for the same; the bill acknowledged the receipt of 900*l.*

It further prayed an injunction against one of the defendants who had been employed as a plumber in the buildings, and [*] threatened to bring an action against the plaintiff for work done, to restrain him from so doing, until he had paid the plaintiff his proportion, as one of the company, for the buildings.

The defendants put in a general demurrer.

Mr. *Lloyd* (for the plaintiff) insisted that the demurrer covered too much, the plaintiff having a right to the discovery though not to relief; and therefore, being a demurrer to the whole bill, it must, according to the course of the court, be over-ruled.

Mr. *Selwyn* and Mr. *Johnson* (for the defendants.)—The plaintiff had no equity, the whole remedy is at law. He states that the orders given by the committee of five, were parol orders given to his servants. These

(1) This case is quite contrary to law and practice. *Vide Price v. James*, *postea*, 318. *Collis v. Swayne*, 4 vol. 480. See also *Ryves v. Ryves*, 3 Ves. 346, 347.; *Muckleston v. Brown*, 6 Ves. 63.; *Barkerv. Dacie*, *ibid.* 686.; *Hodgkin v. Longden*, 8 Ves. 3.; *Sutton v. Earl of Scarborough*, 9 Ves. 71.; and *Beames Elem. Pleas*, 250. But a bill will not be demurrable by a prayer merely for general relief, or for the equitable assistance of the court, merely consequential upon the prayer for discovery; *Brandon v. Sands*, 2 Ves. jun. 514.

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A bill proper for discovery only prays relief, yet a general demurrer was over-ruled, but without costs. (1)

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servants would be his witnesses at law. Having no equity, a general demurrer was the proper method.

Mr. Lloyd in reply. — If there is any thing in the bill to which the plaintiff is entitled to an answer, a general demurrer is bad. In this case he is clearly entitled to a discovery, and although the bill is improperly drawn in praying relief, yet, if they meant to take advantage of that, they might have demurred to the relief; but having demurred generally, by the course of the court, it must be over-ruled.

Lord Chancellor seemed to doubt much as to the course of the court, and to think it incumbent on the plaintiff to know what he prayed, and that therefore, if he prayed relief, where he was entitled to discovery only, the defendant might take advantage of it by a general demurrer, and the bill should be dismissed. That it was a hardship, because, upon a long bill filed, there chanced to be a right to a discovery, the defendants should be put to the expence of taking a copy, and not be able to avoid it by a general demurrer.

Mr. Ainge, as *amicus curiæ*, mentioned a case of *Ridgley v. Hole*, in which a bill proper for a discovery, praying relief, a general demurrer was allowed.

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[*] But, Mr. Lloyd answering, that though that had often been pressed, it had never been done; and the course of the court, to the contrary, being shortly pressed,

Lord Chancellor said, that the matter had been often mentioned, and his inclination had been as it was now; but, if the course of the court was otherwise, The demurrer must be over-ruled without costs.

Mr. Selwyn the next morning mentioned a case of *Measter v. Brampton*, 15th March last, which was a bill filed for discovery and praying relief, which the plaintiff was clearly not entitled to: defendant demurred generally, and Mr. Scott contended the demurrer was bad, and must be over-ruled; Lord Chancellor said no; that as the discovery led to relief to which the plaintiff was not entitled, the demurrer was good, and therefore allowed it.

Lord Chancellor. — The only question is, whether the plaintiff shall be at the expence of a new bill, or the defendant of a new demurrer, and desired the Register to look into the case cited. (2)

Vide postea, the case of *Price v. James*, where Lord Chancellor allowed the demurrer. (3)

(2) No entry of it appears in Reg. Lib.

(3) See the references in note (1) *antea*.

Mr. Brown's copy contains the following note in MS. *Noak v. Noak*, before Lord Bathurst, 19th July 1776.

Bill stated, that on marriage of ancestor of plaintiff, the estate in question was settled to the use of or in trust for that ancestor in tail, or for life, with remainder to or in trust for the issue, and that plaintiff was entitled under that settlement, or as heir general; but that defendant, who is plaintiff's uncle, (though no heir) is in possession, and has the settlement and other deeds. And therefore the bill prayed possession and delivery of the settlement, &c. and an account and satisfaction for the rents. And the bill charged that the defendant threatened to set up terms.

Defendant demurred to all the relief, and to a discovery of the deed; and Lord Chancellor allowed the demurrer, relying on the case of *Whitchurch v. Golding*, 2 Wms. 541. though it does not appear in that case that the demurrer extended to the discovery.

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*Lincoln's Inn
Hall, 18th Dec.*[*Vide S. C.
ante, 1 vol.
301.*]

CATOR against the Earl of PEMBROKE and Others.

(Reg. Lib. 1787. A. fol. 81.)

A RE-HEARING after an order of dismissal, on a hearing in this cause before the late Lords Commissioners, *vid. ante*, vol. 1. p. 301.

The plaintiff's bill, and petition of re-hearing, stated the settlement on the marriage of the defendant, Lord *Bolingbroke*, and the Right Honourable *Diana*, late Viscountess [*] *Bolingbroke*, by which Lord *Bolingbroke* conveyed certain manors, &c. and among them the manor and premises in *Beckenham*, in *Kent*, to the defendants the Earls of *Pembroke* and *Guildford*, to uses under which Lord *Bolingbroke* had an estate for life, with a power to sell and to lay out the money arising from the sale in other lands, to be settled to the same uses; and in the mean time to invest the same in the public funds; — that the plaintiff treated with Lord *Bolingbroke* and the trustees for the purchase of the manor of *Beckenham* for the sum of 19,688*l.* and, by indentures of 21st and 22d of October 1773, the trustees and Lord *Bolingbroke* conveyed the premises to him, and Lord *Bolingbroke* covenanted for himself and his trustees that the plaintiff should have the same free from incumbrances; — that the plaintiff paid the money to the defendants, the trustees, who invested the same in the purchase of 22,930*l.* 1*s.* 10*d.* old *South Sea* annuities, in the names of the trustees, in which the same have continued; and the plaintiff entered into possession of the estate, and continued so till evicted. That plaintiff had discovered that Lord *Bolingbroke*, in 1769, in consideration of 5010*l.* had granted to *Hans Wintrop Mortimer*, and his heirs, a rent charge of 430*l.* during his (Lord *Bolingbroke's*) life, and by indenture of 24th July 1770, in consideration of 3000*l.* paid by Mrs. *Margaret Hare*, he demised to her all the lands purchased by the plaintiff (except the manor) for ninety-nine years, if he (Lord *Bolingbroke*) should so long live, at a pepper-corn rent; and Mrs. *Hare*, by another indenture dated the 25th of the same month, re-demised the same premises to Lord *Bolingbroke* for ninety-eight years and eleven months, (if Lord *Bolingbroke* should so long live,) at the yearly rent of 500*l.* with a proviso on non-payment for re-entry. Lord *Bolingbroke* paid the annuity of 500*l.* to the 24th of January 1774, and, then, neglecting to make good growing payments, Mrs. *Hare* brought her ejectment, which was tried at the Summer-Assizes for *Kent*, in 1780, when a special verdict was found: and in *Michaelmas Term* 1780, judgment was given for the lessor of the plaintiff, and entered up, and Mrs. *Hare* threatened to sue the plaintiff for the costs of the action, and for mesne profits since the day of the demise, unless he paid the same without suit. That in consequence the plaintiff on the 11th September 1779, gave notice to the trustees, in order to have the benefit of the dividends to indemnify him against the proceeding, and against annuities he [*] was informed had been granted by Lord *Bolingbroke*. The bill, and petition of re-hearing, further stated, that Lord *Bolingbroke*, in February 1775, granted to the defendant *John Boldero*, annuities to the extent of the dividends of the *South Sea* annuities; and the trustees, at the request of Lord *Bolingbroke*, signed a letter of attorney to Mr. *Boldero*, who by virtue thereof afterwards received the dividends arising therefrom; and that the plaintiff in 1780 gave *Boldero* notice of his claim upon the *South Sea* annuities; and also

A. purchases an estate of B. without notice of rent charges, &c. the vendor covenanting that there are no incumbrances; the purchase money is laid out in the funds, and B. afterwards sells the dividends for his life, secured by letter of attorney to C. who has no notice. (1) A. is evicted by the grantee of the rent charge: He has no lien whatever on the funds purchased.

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(1) See the notes and references to the case on the original hearing, *ante*, 1 vol. 301.

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that Lord *Bolingbroke* had granted other annuities previous to the plaintiff's purchase, particularly two, of 150*l.* and 450*l.* to *Thomas Maningham Esq.*; secured by bonds and judgments, and that *Mr. Maningham* had extended the plaintiff's estates by writ of *elegit*. The plaintiff, therefore, insisted that he was entitled to the benefit of the dividends on the *South Sea* annuities, to indemnify him against the verdicts, and charged that *Boldero* had notice before the purchase of the annuities; that the money with which they were purchased was the purchase money of the *Beckenham* estate, and paid for the same by plaintiff, and prayed that the dividends might be paid to him, in reimbursement of the costs of *Mrs. Hare's* judgment, &c.

Mr. Boldero, in his answer, stated his purchase of the dividends of the *South Sea* annuities, and admitted he knew that the money with which they were purchased arose from the sale of the estate.

The petition of re-hearing further stated that the cause came on to be heard before the Lords Commissioners, 15th July 1783, when his bill was dismissed, but without costs, by which dismissal he was aggrieved.

Mr. Mansfield, *Mr. Scott*, and *Mr. Hollist*, for the plaintiffs. — The estate was conveyed to *Cator* in fee, with a covenant that it was free from incumbrances; it afterwards appears that rent charges had been granted to *Mr. Mortimer* and *Mrs. Hare*, and as soon as the plaintiff knew of the several transactions, he gave notice to the trustees and to *Boldero*; he contends by his bill that the *South Sea* annuities, being specifically the money paid for the estate, he ought to have so much of it returned to him as will indemnify him against the loss he sustains. The decree dismissing [*] the bill proceeds upon wrong principles. If the purchaser of an estate does not pay the purchase money, the vendor has a lien upon the estate. *Walker v. Preswick*, 2 Vesey, 622. *Pollexfen v. Moore*, 3 Atk. 273. *Chapman v. Tanner*, 1 Vern. 267. Upon the former argument, the case was rested upon this ground, and compared to the case of an exchange, where the very act includes a warranty: here was an express covenant which would prevent the general warranty. *Cator* having paid the money, and been evicted, has an equitable lien on the money, as, in the other case, the seller would on the estate. Upon a total eviction, this would certainly be so, and there is no reason why it should not, on a partial eviction. And it is an equity prior to that of the subsequent purchaser *Boldero*: for if *A.* sells an estate to *B.* who sells it again to *C.* who pays the money, but *B.* has not paid the money to *A.*, and *C.* has no conveyance made to him; though there is no case which says which has the better equity, yet the court would say, that *A.* has the first lien whilst the estate continued in *B.* however hard it might be upon *C.* Like that was the case of *Becket v. Cordley* (ante. v. 1. p. 353.), where the claim of the younger children was held to be a prior equity to that of the second mortgagee. Under the principle of that case, *C.* would find, that so long as the estate remained in *B.*, *A.* would have a prior equity. If this equity subsists with respect to land, to the prejudice of third persons who have not taken in the legal estate, the same equity will subsist with respect to money, whilst it can be pursued; that is, whilst it is in the hands of the vendors who have received the money. Where an estate has been sold by the court, and the money remains in court, if there is any diminution in point of value which makes a deduction right, the court is in a habit of not suffering the money to be paid out, without notice to the purchaser. This was done lately with respect to a purchase made by the Marquis of *Buckingham*. The same argument applies with respect to the money, whilst it can be pursued. But in the present case it is said, that whatever the equity might be, as against Lord *Bolingbroke*, it is different

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different with respect to the trustees and *Boldero*. As to the trustees, there could be no difference between them and Lord *Bolingbroke*, after they had notice of the plaintiff's claim: by parting with the dividends to *Boldero* after notice, they make themselves liable. If the court would give the plaintiff a remedy against Lord [*] *Bolingbroke*, it will do so against the trustees. Then with respect to *Boldero*, the court considered him as a purchaser. The question is, whether he has obtained a legal title; for, if he has only an equitable title, no difference is made by there being, or not being, notice. If a purchaser takes under a will, he must examine the will, and take notice of what it contains. Here *Boldero* admits that he had notice that the *South Sea* annuities were purchase money. This should have led him to make an enquiry of *Cator*, whether he had any claims upon it. He would have answered that he did not know; but that if there should be any incumbrances on the estate, he should have a claim: and under that notice *Boldero* need not have purchased. Persons who have only equitable titles are in no better situation than those under whom they derive their title: *Boldero* therefore is liable to the same equity as Lord *Bolingbroke*. In fact, *Boldero*, so far from a legal estate, has not the dividends themselves; but only annuities equivalent to the dividends.

Mr. *Attorney General*, Mr. *Madocks*, and Mr. *Ray*, for the defendant, *Boldero*.

It is contended on the other side, 1st. That Mr. *Cator* has a lien upon the money.

2d, That it being prior to the conveyance to *Boldero*, he has an equity against *Boldero*.

1st. We contend Mr. *Cator* has no lien. A lien is a right acquired by means of some contract. All cases of prior and subsequent equities arise from contract. Thus in *Becket v. Cordley*, the younger children's equity was, to all intents and purposes, a second mortgage: and it came to be a question, whether the third mortgagee, without notice, should be preferred to them. Whatever final remedy *Cator* may have, it is very different from a lien arising from contract. Upon the purchase by *Cator* he took a covenant from Lord *Bolingbroke*, that the estate was free from incumbrances. Under that covenant he might have a remedy at law, by action of covenant, to recover damages, or he might file a bill here for a specific performance of that covenant. In 1775, *Boldero* purchased Lord *Bolingbroke*'s interest in the dividends, and took an assignment of the dividends for his life, and a letter of attorney made irrevocable to receive the dividends. It was impossible for the trustees to give [*] him a better title. In 1780, Mrs. *Hare* brought her ejectment to recover her arrears. *Cator* paid her: and from that time had a right to stand in her place. But Mrs. *Hare* had no claim upon the dividends; so that *Cator*, by the transaction with her, got no more than he had before; a right to file a bill for specific performance, or to bring an action to recover damages for the breach of covenant; and, as it remained uncertain which he would bring, that cannot by any means be called a lien. Wherever the court speaks of prior equities, it means clear and precise equities; and it is of such only that it says *qui prior in tempore potior in jure*. Before Mr. *Boldero*'s purchase, it would have been very doubtful whether the court could have applied the dividends to the payment of Mrs. *Hare*'s arrears, because there was no contract with Mrs. *Hare*, as to that part of his property. But after it, how could Mr. *Cator* possibly affect them; could he have made them liable to a *feri facias*? Certainly not, for Mr. *Boldero* was a purchaser for valuable consideration, without notice of Mrs. *Hare*'s annuity. The cases of following money are, in fact, only cases of following securities; as, for instance, bills in the hands of a factor, who has become a bankrupt. In *Bennet v. Mayhew*

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(cit. vol. i. p. 232.) the court instituted an enquiry whether any of the money had been laid out by the consignee in land. The bills originally sent from *Ireland* were traced into the hands of persons who had paid for them in paper; which very paper was traced to the hands of the vendors. Though there was no direction to *Mayhew* to lay out the money in land, and he was accountable for money, yet the court presumed that he purchased for his principal. This case is very different from those put by Mr. *Scott* and Mr. *Hollist*. It is not the case of money, which, when paid to the vendor or his banker, and mixed with his own money, loses its nature and becomes impossible to be identified, like water; but of securities, whose nature is such as to be followed. Suppose it to be laid out in a house, and the house afterwards sold, could the original vendor follow it into the hands of the purchaser? No. Suppose it invested in the funds, must the party dealing for the funds, enquire whether the estate sold was encumbered? It is impossible: it would break in upon all the transactions of mankind. It is said *Cator* had a lien on the annuities against Lord *Bolingbroke*: that is doubtful; for there was no contract to make the annuities liable.

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Then, 2dly, What is the case when they come into the possession of a purchaser who has all the possession possible? He could not have annuities; for he was only to have the dividends for Lord *Bolingbroke's* life.—Then he buys for a full valuable consideration, and he takes a letter of attorney, made irrevocable, for the receipt of the dividends. It is like a symbolical possession of that which cannot be delivered in specie, as documents where the subject is abroad, or new papers with respect to a ship; it is the only possession the nature of the property will admit. It is a possession of the dividends where he could not have the principal sum.—And this he took without notice, and by *Cator's* default; for had *Cator* used due diligence, he might have insisted that the stock purchased with the purchase-money, should be conveyed to him, in conjunction with the other trustees, that he might be indemnified if evicted: and, not having done so, he put it in the power of the trustees (who had not covenanted for the estate being free from incumbrances) to dispose of it. The Lords Commissioners, though they rather assumed that there might be a lien upon purchase-money, said that, in this case, there could be no remedy; that Mr. *Boldero* had obtained a possession of the annuities, which could not be taken from him, unless there was something to affect the integrity of his mind. His conscience therefore being pure and unaffected, the court ought not to take from him the money he has received, and is in legal possession of.

Mr. *Hardinge* and Mr. *Graham* were for the trustees, but declined arguing the case, as being uninterested in the event.

Mr. *Mansfield*, in reply.—I shall contend, first, that *Cator* has a claim to follow the purchase-money, as against Lord *Bolingbroke*.

2dly, That he has such claim against *Boldero*.

1st, *Cator* being defrauded of what he treated for, has a right to follow his money against Lord *Bolingbroke*. If a man sells goods to another, who pays his money into the hands of a banker, and it appears, before the money is paid over, that the vendor has no title, the vendee, giving notice to the banker, shall have the money repaid him. The same doctrine applies to money paid for land, as far as it can be followed. The case cited by [*] Mr. *Madocks* of *Bennet v. Mayhew* is a strong case to this purpose. *Mayhew* was a depositary of money which he had laid out in land. So in a case of *Lane v. Deighton*, before Sir *Thomas Clarke*, where a husband had got into his hands money belonging to his wife, and laid it out in land: upon the evidence of a paper in *Deighton's* own handwriting, which shewed that the very money which he received was paid for the purchase, the wife was decreed to have the benefit of the land.

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The

The only difference between these cases and this is, on the question whether the money could be traced. If Lord *Bolingbroke* had continued in the receipt of the dividends, *Cator* would have had a right, against him, to be put into possession of them. — Then the question is, whether this right continued after the assignment to *Boldero*? — On the other side, it is contended *Boldero* had a legal right: but he had no right at law whatsoever; he could bring no action against [*Cator*], he was only the servant of the trustees. — As to the letter of attorney being irrevocable; it was by its nature revocable at law: the making it irrevocable is only a contract in equity not to revoke. If so, *Boldero* had only an equitable title, subject to *Cator*'s prior equity. But it is argued, that should this be the case, men in *Boldero*'s situation will be liable to great hardships: but they will not be liable to greater hardship than in other cases where a prior equity takes place of a posterior one; as in *Becket v. Cordley*, where the second mortgagee was grossly imposed upon. — Then the prior equity must take place in this, just as it did in that case, this case falling under precisely the same rule.

Lord *Chancellor*. — Suppose the trustees on the conveyance to *Boldero*, had declared a new trust for him during the life of Lord *Bolingbroke*; I cannot see how that would have differed from transferring the stock to a new trustee, which would be equivalent to an assignment to the party: the old trustees declaring a new trust would not be trustees for the whole equity. — I have great doubt on the other part of the case. Not having seen the argument of the Lords Commissioners, I was prepared to say that the party could not follow the money when deposited with the trustees; but that having taken a covenant for quiet enjoyment and a good title, that his remedy was that way. *But I see the Lords Commissioners did not say the money might be pursued. If they had given that opinion, I think I should have differed from [*] them*: but on the part of the case on which they did give their opinion, I agree with them. I think the act done by the trustees is equivalent to a new declaration of trust for *Boldero*: and the question then is, whether that does not make the trustees as effectually seised for him, as if he had it assigned to a new trustee. — By the best judgment I can form, the judgment is right.

Decree affirmed.

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CATOR
against
The Earl of
Pembroke.

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HILARY TERM,

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28 Geo. 3. 1788.

Earl of MASSERENE against LYNDON.

(No entry.)

THE plaintiff having obtained an order for amending his bill, on payment of 40s. costs, the defendant moved to discharge that order, and taxed costs, but only 40s.; [unless in a case of particular oppression.] (1)

(1) *Fide Rowe v. Stuart*, 1 Dick. 58. *Bullock v. Perkins*, *ibid.* 110. and *Freke v. Culpepper*, *ibid.* 284.

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against
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that the plaintiff might pay taxed costs. And the ground of this application was, that the plaintiff had amended his bill three several times before, with very large amendments; and the expences to which the defendant had been put in taking office copies of these amended bills were three times as much as the 40s. costs allowed.

Lord Chancellor said that the mere statement of the number of sheets in the several amended bills, was not sufficient to break through the general rule: *but, in order to do this, a defendant must state a case of particular oppression.* (1) There must be a general rule upon this subject, and that general rule allows but 40s. costs, and must be abided by.

Motion refused.

(1) See note (1) in the preceding page.

COPPIN against FERNYHOUGH. [29th January.]

(Reg. Lib. 1787. A. folios 327. 433.)

Renewal of a prebendal lease is an redemption of a bequest of it (1): but a codicil to the will, though to pass after-purchased property is a republication of the will, and the lease shall pass by such republication. (2) Mortgage of a lease which recited the surrender of a former lease, which was in consideration of the surrender of a former lease, in which plaintiff's title appeared, held to have notice of the title. (3)

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JOHN COPPIN, by indentures bearing date the 18th and 19th of October 1737, conveyed his manor of *Markyate* and other freehold estates to trustees, to the use of himself for life, [*] remainder to the use of his son *John Coppin* for ninety-nine years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to trustees for a term to raise portions for younger children, remainder to his first and other sons in tail male, remainder to the settlor's daughters in like manner, remainder to *Samuel Coppin*, the settlor's brother in like manner, remainder to *Joseph Reynardson* in like manner, remainder to *Zephaniah Pierce* in like manner, remainder to *William Pittman* for life, remainder to *John Pittman* (his son, and father of the plaintiff) for life, remainder to his first and other sons in tail male, remainder to the settlor in fee. All the persons taking, were to take the name of *Coppin*.

The testator was seised of a freehold farm called *Chanland Farm*, and possessed of the manor of *Caddington Major* (the premises in question), held by lease from the prebendary of the prebend of *Caddington Major* in the cathedral church of *St. Paul, London*, for twenty-one years, which lease was usually renewed every seven years, and which he held at the time of making his will, by a lease for twenty-one years, dated 20th of November 1736, (and which he afterwards renewed 18th of November 1740); and being so seised and possessed, he made his will dated 20th of October 1737, and thereby gave to his daughter an annuity, charged upon *Chanland Farm* and other premises, and also upon all his leasehold estates in the said parish of *Caddington*, and devised the same, subject to the annuity, to the same uses, intents, and purposes as are declared in the above recited deed.

After the making of the said will, the testator purchased another prebendal lease for three lives, and made a codicil to his will, dated 27th of July 1741, (which he declared was to be annexed to his will) by which he gave the said newly acquired estate to trustees, to the use of his

(1) See *Hone v. Medcraft*, ante, 1 vol. 261. with the notes and references, especially 11 Ves. 390, &c.

(2) See on the principal case, by the present Lord Chancellor, *arguendo*, 1 Vesey, jun. 488.

(3) See *Moore v. Bennett*, 2 Ch. Ca. 246. Lord Redesdale's note. Vide the extract at the end of this case. Notice of an instrument notice of contents. See the cases cited in *Pearson v. Morgan*, postea, 388. 387. *, note (3). On doctrine of notice in general, see Beames's Elem. of Pleas, p. 243. et seq.

daughter

daughter *Mary* for life, remainder to the uses above declared of his other estates. (4)

John Coppin died in 1742, *John Coppin* his son and executor proved the will, and entered into the possession of the estates, and died in 1745, without issue: *Mary Coppin* had died in his life-time, and accordingly *Samuel Coppin* entered upon the estates [*] as the next devisee; and, he also dying without issue, *Joseph Reynardson* entered, and took the name of *Coppin*.

Zephaniah Pierce, *John Pierce*, and *William Pittman*, the subsequent remainder-men, all died in the life-time of *Joseph Reynardson*; *John Pierce* left no male issue, and, therefore, on the death of *Joseph Reynardson Coppin* without issue, *John Pittman* (father of the plaintiff, and who was a plaintiff in the original bill by the name of *John Pittman Coppin*) became entitled, under the limitations in the deed, to the premises, for ninety-nine years, if he should so long live; and the present plaintiff, his son, to the remainder in tail of the real estates, and the absolute possession (subject to his father's life estate) in the personal estate.

The lease of the *Caddington* estate had been several times renewed by the several persons in possession, and particularly by *Samuel Coppin*, by a lease of the 30th of November 1756, in which he was styled devisee of *John Coppin*: and, on the 4th of November 1768, a new lease was made to *Joseph Reynardson Coppin*, and another in 1776, on which he paid the fine. *Joseph Reynardson Coppin* afterwards mortgaged the premises, as his own property, to the defendant *Brown*, for securing the payment of 1500*l.* and made a will, by which he took upon himself to devise the said estate to the defendant *Fernyhough*, and made her and the other defendants, *Ann* and *Susannah Reynardson*, executrixes of such his will.

This was the case made by the bill: the defendants, in their answer, set up an adverse title; pretending that the first owner of the *Caddington* estate was *Samuel Coppin*, and that he devised it to *Joseph Reynardson*, who mortgaged to the defendant *Brown*, and devised to the defendant *Fernyhough*. But the plaintiffs established by evidence that the *Caddington* estate was the property of *John Coppin*, and passed by his deed and will; so that *Joseph Reynardson Coppin* had no title to mortgage or devise the same, being, only, tenant for ninety-nine years, if he should so long live.

This reduced the cause to two questions.

[*] 1st. The lease of the *Caddington* estate being devised by the will, and a new lease taken in 1740, whether the taking the new lease was not an ademption of the bequest, and, if so, whether the codicil was a republication of the will?

2dly. With respect to *Brown*, the mortgagee of *Joseph Reynardson Coppin*, who had no other notice of the defect in his title, than that the lease to *Joseph Reynardson Coppin*, which was assigned to him, recited, among the considerations, the surrender of the former lease which recited the surrender of the other, in which *Samuel Coppin* was styled devisee of *John Coppin*.

Mr. Mansfield and Mr. King for the defendants, *Ann Fernyhough*, *Ann Reynardson*, and *Susannah Reynardson*. —

The preliminary point, made by the defendants in this cause, is that, in

(4) " And he directed that if any of the persons beneficially entitled in the premises devised by the said codicil for the time being, should, for six months after the death of any of the persons named in the lease thereof, neglect to obtain a renewal of the lease, then the trustees were to receive a competent part of the rents, and to pay thereout the fine and other expenses of the renewal."

Upon this the Court declared, " that the lease under which the estate called *Caddington Minor* was held, ought, according to the will of the testator, to have been kept up by and out of the rents and profits of the said estates." Reg. Lib. 351.

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fact, the lease of *Caddington Major* did not pass by the will of *John Coppin*, the bequest of it having been revoked or adeemed by the renewal of the lease in 1740. That such a renewal operates as a revocation or redemption of a prior bequest of such a lease, is decided by several cases: and the ground of those decisions is, that the bequest, being a bequest of that specific existing term, and that specific term being absolutely annihilated by the surrender, the new lease passing a totally new estate, the legacy is adeemed or revoked, as in other cases of specific legacies. *Abney v. Miller*, 2 Atk. 593. *Hone v. Medcraft* (ante vol. i. p. 261.) On the part of the plaintiff, it was urged that the codicil, which was subsequent to the renewal, was a republication of the will. But there is no case which says that the mere circumstance of making a codicil, without any reference to the subject matter of the will, shall operate as a republication. The cases have generally arisen on real estates; but, if this would not have been a republication of a will as to real estate, it will not in the present case. In order to make this amount to a republication, there should be words in the codicil shewing, in some manner, an intention in the testator of referring to this leasehold estate particularly, or at least generally, to the subject devised by his will. *Lytton v. Lady Falkland*, and the other cases mentioned in *Acherly v. Vernon*, Com. Rep. 381. are very strong to this point, though the principal case was decided to amount to a republication. But here the [*] codicil is made for the single purpose of disposing of a property which the testator acquired after he had made his will, and relates to no other subject whatever. As to the direction that the codicil was to be annexed to his will, it is nothing more than what every codicil is supposed to be, and proves no intention subsisting in the mind of the testator as to the contents of his will. But if the court should be of opinion that the plaintiff is intitled to an assignment of the lease, it must be on the terms of allowing to the executrixes of *Joseph Reynardson Coppin*, the several sums of money paid by him, for the renewals, beyond his actual enjoyment by means of the renewed leases, according to the principle of *Nightingale v. Lawson*, (ante vol. i. p. 440.)

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Mr. *Solicitor General* (for the defendant *Brown*) argued, that he was a mortgagee without notice from *Joseph Reynardson Coppin*; that he lent his money under the lease of 1776, in which the lessee is not described as devisee under *John Coppin's* will, and that he was not bound to look back into the former leases, to see under what title each renewal had been made.

Mr. *Scott* and Mr. *Ainge* (for the plaintiff).—As to *Brown*, the mortgagee, being affected with notice of the plaintiff's title, it is true the lease of 1776 does not describe the lessee with reference to the will of *John Coppin*, but it is made expressly in consideration of the surrender of the former lease of 1768, and with an exception, in the assurance of quiet enjoyment, as to the interests of all persons claiming under the surrendered lease, which is an usual exception in all these, as well as church leases of the same nature. However it is sufficient to call upon purchasers to look back to see what interests there are: and, if *Brown* had gone back to the lease of 1756 he would have seen *Samuel Coppin* described as devisee in the will of *John Coppin*. On the other question, it seems the clear result of the cases that the renewal of a lease will, in general, be a revocation of a specific bequest of the testator's interest under it; for though there has been a distinction attempted in some cases between the bequest of "the lease of certain premises," and of "those premises holden under such a lease," yet, in the *Attorney General v. Downing*, Lord *Camden* treated this as an [*] idle distinction: but the question here will be, whether the testator meant to give his specific interest

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interest in the land. There is evidence, on the face of the will, that he did not: he has devised his leasehold property to the same uses as the freehold was settled: he has anxiously provided for the utmost entail of the leasehold estate, which is incompatible with the duration of this specific lease; and it will be difficult to find any case where a bequest of a property so circumstanced has been considered as revoked by the renewal of a lease, which was absolutely necessary to effectuate the express purposes of the bequest. But, if this should be a revocation of the bequest, yet the codicil will amount to a republication of the will, which will thereby pass the renewed lease. The very act of making a codicil, without the additional circumstance of annexing it to the will, seems to have been considered by the cases as amounting to a republication of the will. *Alford v. Alford*, 2 Vern. 209. and more fully stated in *Marwood v. Turner*, 3 P. W. 168. *Litton v. Lady Falkland*, 3 Ch. Rep. 190. *Potter v. Potter*, 1 Ves. 442. *Gibson v. Lord Montford*, 1 Ves. 485. These cases were very fully considered in the *Attorney General v. Downing* before Lord Camden in 1769, (A) and in that case, [his Lordship was of opinion] that a will [would be] republished by a codicil annexed to it, though the codicil related to subjects perfectly distinct from the will, and his Lordship's opinion was, that a will of land would be republished by a codicil relating wholly to personalty, provided it were attested by three witnesses, *Heylin v. Heylin*, Cowp. 130. In the present case, the codicil is expressly directed to be annexed to the will, which will certainly serve to republish a will of personalty.

Lord Chancellor. — The ground of Lord Camden's opinion in the *Attorney General v. Downing* was that, where the testator annexes a codicil to his will, he treats them as *one instrument*, and makes them so from that time. (5) But, without entering into the question of republication of wills of lands, I think that, in this case, where the testator speaks of a codicil to be annexed to his will he speaks again of his will, and, at least, in case of personal estate, it amounts to a republication. I think, therefore, that the plaintiff will be entitled to have an assignment of this lease, according to the prayer of the bill. As to the terms upon which it is to be assigned, in respect of the money paid [*] for the renewals by *Joseph Reynardson Coppin*, the rule is a very plain one, though there sometimes may be difficulty in applying it. *Joseph Reynardson Coppin* ought to pay no more of those expences than he actually received benefit from. From the lease renewed in 1776, he received no benefit, for the former lease did not expire till 1789, and he died in 1781. The whole of that must therefore be allowed to his executrixes, and a proportion of the lease of 1768. I shall also declare the mortgagee *Brown*, to be affected with notice of the plaintiff's title (6), and he must convey the estate accordingly; but the money to be allowed to the estate of

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(A) That case has been since repeated, Amb. 571. The Court was of opinion, that for want of annexation or reference to the will, the codicil was not a republication.—*Mr. Brown's MS. note.*

(5) Lord Eldon, in arguing the case of *Barnes v. Crowe*, when *Solicitor General*, 1 Ves. jun. 488. observed: "In *Coppin v. Fernyhough*, according to the note I took, the late Lord Chancellor thought the fact of actual annexation of a codicil, executed by three witnesses, as being a republication or not, must depend upon this, whether it was done at the time of the execution; in which case he seemed to think it would do without any reference in it to land; but he entertained great doubts whether it would do if at any other time."

(6) In *Moore v. Bennet*, 2 Ch. Ca. 246. it is laid down, that "in all cases where the purchaser cannot make out a title but by a deed, which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is *crassa negligentia*, that he sought not after it."

Joseph

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Joseph Reynardson Coppin, in respect of the fees paid by him on the renewals, under the account I have before directed, must be paid to *Brown*, instead of the executrixes of the mortgagor, in discharge of his debt.

Rolls, 8th, 12th
of Nov. 1787.
In Court, 26th
of Jan. 9th of
Feb. 1788.

The testator having a power over 3000*l.* originally the property of his wife, gave several legacies, and then (after the death of his wife) the residue to the defendant: his estate was not sufficient to pay the legacies; yet held, that the will was not an execution of the power, the same not being referred to, nor any thing by which an intention appeared in testator to execute it. (1)

[Evidence to shew the testator's own estate was insufficient for the purposes of his will, without the 3000*l.*, rejected. (2)]

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ANDREWS against EMMOT.

(Reg. Lib. 1787. A. folios 26. 661. b.)

BY a settlement bearing date 8th *December* 1775, made previous to the marriage of *John Andrews*, deceased, with the plaintiff *Elizabeth Andrews* (then *Elizabeth Bromley*) late his wife, and now his widow, a sum of 3000*l.* three per cent. reduced Bank annuities, was conveyed to trustees, in trust to permit *Elizabeth* to receive the dividends, &c. till the marriage; and, after the solemnization thereof, to pay the interest to the husband for life, and, after his decease, in case the plaintiff should survive him, to raise 500*l.* and pay the same to plaintiff to her own use, and to pay the interest of the residue to the plaintiff for life, and, after the decease of both, to distribute such residue among the children of the marriage, in such manner as therein mentioned, and in case there should be no child (which was the case which happened) upon trust, to transfer the stock to such persons, and in such shares, &c. as the said *John Andrews* should by deed or will appoint; and, in default of such appointment, to such persons, &c. as the plaintiff should by deed or will appoint, and, in default of appointment, to the executors or administrators of the plaintiff: and the husband, by the same deed, covenanted, that the wife, in case she should survive him, should have her paraphernalia, and should also have all the rents, dividends, &c. of the real and personal estate, that he [*] should die seised or possessed of, from the time of his decease for her life.

The marriage took effect, but there was no issue.

On the 11th of *March*, 1776, *John Andrews* made his will, and, thereby, gave to his wife all the wine, &c. which should be in his house at the time of his decease, and the use of his plate, &c. during her life, and, after her decease, he directed that what should remain thereof should sink into the residue. He then gave several legacies, to be paid after the decease of his wife: "And all the rest and residue of his monies, and securities for money, goods, chattels, and personal estates whatsoever and wheresoever, and of what nature, kind, or quality soever, from and after the death of his wife, he gave and bequeathed unto *John Emmot* (the defendant), his executors and administrators, to and for his and their use and benefit for ever."

(1) "*Andrews v. Emmot* is a leading case, and has perfectly and clearly established, "that to execute a power there must be a direct reference to it, or a clear reference to "the subject, or something upon the face of the will, or independent of it some circumstance which shews the testator could not have made that disposition without "having intended to comprehend the subject of his power." *Per M. R. in Hales v. Margerum*, 3 Ves. 301. As to the latter branch of the distinction, however, see 7 Ves. 400. *S. P. with the principal case, Langham v. Nenny*, 3 Ves. 467. 469, 470. *quod vide*. So likewise *Standen v. Standen*, there referred to, 2 Ves. jun. 589. Affirmed Dom. Proc. 6 Bro. P. C. 193. Upon the principal case, *vide ibid.* 2 Ves. jun. 592, 593. See also *per Lord Eldon C. very particularly in Nannock v. Horton*, 7 Ves. 399, 400. *Et vide Bennet v. Aburrow*, 8 Ves. 609. 616. *Jones v. Tucker*, 2 Meriv. 533. 536. 1 Ball. & Beatt. 92, 93. *Jones v. Curry*, 1 Swanston, 66.

(2) See most of the references in the preceding note, especially 2 Ves. jun. 593. *per Lord Eldon C.* 7 Ves. 399, 400. 2 Merivale, 536, 537. 1 Swanston, 71, 72, 73.

John

John Andrews, the testator, died in 1779, without revoking or altering the will.

The plaintiff filed this bill to have the 3000*l.* *three per cent.* reduced Bank annuities transferred to her, as not having been appointed by the testator, her husband.

The defendant contended, by his answer, that the testator had by his will executed his power; that the will was made with a view to, and in compliance with, the marriage settlement; and that the legacies amounting to more than the estates and chattels of the testator (after payment of debts) would be sufficient to satisfy, he could have no benefit of the residuary clause, unless the testator had thereby executed his power.

The cause came on at the Rolls, the 11th of *May* 1785, when it was referred to the Master to take an account of the personal estate of the testator (other than the 3000*l.*) at the time of making the will, and of the debts, funeral expences, and legacies; and whether his personal estate (after payment of debts, &c.) was sufficient to pay the legacies. On the 10th of *March* 1787, the Master made his report, stating, that the personal estate of the testator, at the time of his death, was insufficient to [*] pay the legacies by the sum of 664*l.* 1*s.* 5*d.* but he did not make any report as to the amount of testator's property at the time of making the will.

The cause now came on for further directions, on the question whether the testator's will was an execution of the power.

Mr. Selwyn, *Mr. Hardinge*, and *Mr. Hood* (for the plaintiff).—The 3000 *three per cent.* reduced annuities, which are the subject of this suit, were originally the property of the wife, and settled upon the marriage to the use of the husband for life, with remainders over, and, among other things, with a power to him to dispose of it in certain events. The question is, whether he has exercised that power by the will which is before the court, in which he has given a general residue. With respect to his intention so to do, the probability is, that he had no such intention. The will was made very soon after the marriage, so that there was then no improbability of there being issue of the marriage, in which case he had no power of disposal: he had property of his own upon which the residue would operate, and although he may have miscalculated the amount of it, that is no uncommon thing for testators to do. But the court cannot presume an intention to dispose of the fund merely from having a power so to do. Although it is not necessary that the power should be recited or expressly referred to, there must be something to shew that he intended to act upon it, or at least had it in his contemplation. This appears from 2 *Eq. Abr.* 659. And in *Molton v. Hutchins*, 1 *Atk.* 558. where *John Cutler* devised the income and produce of 1000*l.* stock to *Freeman Cutler* for life, and gave him a power to dispose of 400*l.* thereof; *Freeman Cutler* made a will, and gave several legacies, and then devised the rest and residue of his personal estate; it was held that this was not an execution of the power. So in *ex parte Caswell*, 1 *Atk.* 559. Lord *Hardwicke* said, that though a man may execute a power without reciting or taking the least notice of it, yet it is necessary he should mention the estate which he disposes of.—It may be doubtful whether the counsel on the other side will contend, that the whole of the 3000*l.* shall pass, or only sufficient to make up the legacies; it will bear particularly hard upon the plaintiff, who is to take this property if the [*] power is not executed, to have it taken from her in a question between her and a residuary legatee, who is a mere stranger.

Mr. Scott and *Mr. Lloyd* (for the defendant).—The question is, whether the testator intended to dispose of this money, over which he had a power, by his residuary devise.—Where a person has a power it

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is not necessary to the execution of it that he should refer to it; as, in a power of leasing, the lease will be taken out of the power without any recital of it. *King v. Melling*, 1 Vent. 214. 225. There must be some mention of the subject, or something which should shew the intent; mentioning the subject is only one way of shewing intent. *Probert v. Morgan* (3), 1 Atk. 440. The question here is, whether he did not necessarily mean to comprehend this subject, over which he had a disposing power. There is not a doubt but that the testator meant the residuary legatee should take some bounty, and that it should be considerable: but, if the plaintiff succeeds, he will be so far from taking any thing, that the fund will fall 600*l.* short of paying the legacies. The testator does not give any thing to the wife, because he knew she was to take the whole for life under the settlement, and therefore he has postponed the residuary devise till after the death of his wife. It further appears that the power was in his contemplation, because he has expressly referred to property in the funds, and it seems that he had nothing there of his own.

Master of the Rolls, after reciting the settlement and will, The question is, whether the plaintiff, the wife, is to have this 3000*l.* or it is to remain to answer the exigencies of the will: and that question depends upon another, whether the husband has executed his power; for there is no doubt but that if he intended to bind this money he had power so to do. I admit it is not necessary, for the purpose of executing a power, that it should be recited in express terms, or that it should be by a technical deed; it is only necessary that the power be executed. There is no dispute here with respect to the nature of the instrument, but only, whether he meant to execute it. I looked into a book of no great authority, 12 Mod. but in which, in the case of *Parker v. Kett*, p. 469. I find this rule laid down, that [*] "when one has an authority, and does an act which can be good no other way but by virtue of that authority (4), it shall be understood to have been done by virtue of his authority: but where one has an interest and authority together, and does an act generally, it shall be construed in relation to his interest, and not to his authority." (4) If one applies this doctrine to the present case, the testator has not referred to the power, but has done the act generally; and he had property of which he could dispose. To send it to an enquiry as to the quantum of that property, might lead to conjecture, which is a method of deciding cases to be avoided, if possible. (5) Then does this devise of the residue necessarily refer to the power over the 3000*l.* Where a person has other property to answer the disposition, this cannot be included. As in the case of copyhold estates, they shall not pass by a disposal of lands if there is other real estate to answer the disposition; though they must if there be no other. Here then was other property which would apply, and which was also guarded up to the time when the residuary bequest was to take place; as it was also settled on the wife for life. Would it not do violence to the settlement to say the 3000*l.* was included? The will would act upon property, which the testator might act upon, even though he should have issue. Upon these grounds (for I never wish to go upon conjectures) I should incline to decree for the plaintiff: but I have with me the dicta, at the head of the title *Power*, in 2 Equity Abr. that there must be some kind of reference to the power. There is also a case of *Probert*

(3) See it stated from Reg. Lib. Sugden on Powers, 282.

(4) See Lord Eldon C.'s observations on this, and on the principal case, 7 Ves. 399, 400.

(5) See 2 Ves. jun. 593. 7 Ves. 399, 400. 2 Merivale, 536, 537. 1 Swanston, 71, 72.

v. Morgan (6), 1 Atk. 440. where Lord *Hardwicke* says it is not necessary that a party having a power, should refer to the deed out of which it arises, but it is enough that his intent appears; and if he sufficiently describes the estates he had a power to charge. But here the testator has not described any thing: all his expressions will refer to his own property. I cannot therefore forbear being of opinion, that I shall better agree with the cases, by declaring the will not to be an execution of the power.

Decree for plaintiff.

Mr. *Scott*, after the decree pronounced, mentioned a case like this, of *Jackson v. Hart*, lately before Lord Chancellor.

[*] From this decree an appeal was brought before the Lord Chancellor, which was heard on the 26th January, and 9th February in this Term, when Mr. *Selwyn*, Mr. *Hardinge*, and Mr. *Hood* again argued for the plaintiff, that the will was not an execution of the power: Mr. *Scott*, Mr. *Graham*, and Mr. *Lloyd*, for the defendant, that it was.

With respect to the will being, or not being, an execution of the power, the argument was nearly a repetition of that at the *Rolls*, but the counsel for the defendant raised a new point, that the reference to the Master, with respect to the property of the testator at the time of making the will, and as to which he had made no report, was material; as evidence of that subject would be admissible, and operative to shew his intention to execute the power. (7) The question, being a question of intention, if the evidence will explain what that intention was, it ought to be let in. The reference to the Master, with respect to the testator's property at the time of making his will, would be very material for this purpose; as he must intend the legatees to take the bounties given them by the will: and if his own property, independent of this over which he had a power, would not be sufficient for the purpose, he must intend to make this property liable to them. There have been several cases where such evidence has been introduced. In one of *Hanson v. Fyldes*, Cowp. 833. evidence of the value of the testatrix's estate was offered. On the trial of the cause at *nisi prius*, Mr. Justice *Gould*, who tried the cause, rejected it. Upon a motion for a new trial, Lord *Mansfield* and the other Judges thought the evidence not relevant; but that was upon the circumstances of the case, and rather shews their opinion that, if it would have explained the intention of the testatrix, it might have been let in. In *Collier's* case, 6 Co. 16. evidence of the value of the estate, was let in to shew the intent of the testator that the devisee should have a fee. In *Ivy v. Gilbert*, 2 Wms. 13. there was a reference to the Master, to enquire into the annual value of the lands, in order to explain from thence the intention of the testator, how the portion should be raised; which shews that such an enquiry is competent where it will explain the intent. So, in the common case, where a testator charges all his land, and has both freehold and copyhold, if the freehold lands are sufficient to bear the charges, the copyhold [*] are held not to be charged; but if the freehold is not sufficient, the copyhold is held liable. There the value of the freehold must be enquired into, in order to see whether the copyhold is, or is not, liable. In *Hogan v. Jackson*, Cowp. 299. evidence was admitted, that the testator was possessed of chattels real, in order to explain the terms of the will. In a case of *Kirwan v. Johnson*, in *Styles's Reports*, 293. on a question, what lands should pass, under a charge for payment of debts, evidence was given of the value, to shew that unless the real estate passed, the debts could not be paid.

(6) See it stated from Reg. Lib. Sugd. on Powers, 282.

(7) The petition of appeal insisted (*inter alia*), "that the residuary bequest, which could not take effect without including the residue of the 3000*l.* Bank 3 per cent. annuities, was a good execution of the power." Reg. Lib.

1788.

ANDREWS
against
EMMET.

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[*303]

1788.

ANDREWS
against
EMMOT.

In *Cooper v. Williams*, Prec. Cha. 71. there was a reference to the Master, to state the amount of the personal estate. The admission of this evidence will not clash with the rule laid down in *Fonnereau v. Poyntz*. (ante. v. i. p. 472.) On the other point, the circumstance of the will, which disposed of nothing but personalty, being attested by two witnesses in conformity with the power, is strong evidence, that the testator meant to execute the power.

Lord Chancellor. — I think this case does not amount to a probable argument. With respect to the evidence, when the case came back his Honor thought the reference immaterial; and I think it is so. (8) The testator, under the settlement, was competent to make a will, as to so much of his property as should remain after the death of his wife; the question is whether in making that will, he has executed the power against his wife, whose property the fund was. It is necessary, in order to do this, that he should by his will, notify his intention to do it. It is too late now to expect that a testator, in order to execute a power, shall make an express reference to it; because it has been determined that, if a man disposes of that over which he has a power, in such a manner that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. (9) But the doctrine is not carried, by any case, further than this, and it would be cruel to do it; as it would be throwing the property of testators into utter confusion. Then you must not go out of the instrument itself, to gather the construction of it. I do not mean by saying this to exclude the rule, that where there is what has been called a latent ambiguity in the will you shall not go out of the will to explain the testator's intention by circumstances: but to enquire into [*] the testator's situation, in order, from thence, to gather what it is *probable he meant* is a great deal beyond that. Here the testator has made a will by which it does not appear he recollected the settlement made upon the marriage, at least there is only one circumstance, the postponement of the residue till after the death of his wife, by which he appears to remember it; for I do not rely on the argument of those who insist, that from the attestation of the will by two witnesses, he intended to execute the power.

Decree affirmed. (10)

(8) See the references in note (5).

(9) See *per Lord Eldon* C. 7 Ves. 399, 400.

(10) And the deposit paid to the plaintiffs. Reg. Lib.

Master of the
Rolls for Lord
Chancellor.

Lincoln's Inn
Hall, 22 Feb.

CLARKE against HACKWELL.

(Reg. Lib. 1787. A. fol. 739.)

A term settled to the husband for life, remainder to the wife, her executors, administrators, &c. for the residue of the term, for her jointure: and for the better settling the term on her for life, for her jointure, a covenant to renew and insert her name. The addition of those words will not reduce it to an estate for life.

JOHN CLARKE, 25th March, 1775, being about to marry *Mary Hackwell*, and being possessed of a lease for two lives, conveyed it to *John Hackwell*, the father, "In trust to permit and suffer *John Clarke* (the husband) to receive the rents and profits during his natural life, then in trust to permit and suffer *Mary*, (the wife) her executors, administrators, and assigns, to receive the rents and profits during all the residue and remainder of the said term then to come and unexpired, for her jointure. And, for the better and more secure settling the said leasehold estate, upon the said *Mary* for her life for her

"jointure."

"jointure:" he covenanted, under a penalty of 100*l.* to renew for her life, to commence from the term then in being.

The husband afterwards renewed the lease, but, the wife being in an infirm state of health, he put in the name of his nephew. The testator died in 1782, having made his will, whereby he gave the leasehold estate, subject to the wife's life, to the plaintiff *John Clarke*, for life, with remainder to plaintiff *Clarke* the younger; and made the defendant executrix. After the decease of the husband, the wife insisted on the penalty for not having taken the new lease in her name, but compounded it for 50*l.* She died in 1786, having by will devised the premises to the defendant *Thomas Hackwell*.

[*] This bill was filed by the two *Clarks*, the devisees of the husband, against his executor, praying that he might be decreed to assent to the legacy, and might assign the terms to them.

Mr. Mansfield and *Mr. Stainsby* (for the plaintiff). — There is no doubt that the intention of the settlement, only, was that *Mary* should have a life-estate, it could not be intended she should take the whole term in the subsisting lease: the end of the settlement was to secure her a jointure, which is satisfied by her taking a life-estate, the other words are merely a mistake. It is like the case of *Coryton v. Hellier*, 10th August, 1745 (1), where the words, *if he shall so long live*, were supplied. The residue of the term must therefore pass by the will of *John Clarke*.

Master of the Rolls stopped the defendant's counsel, and said, *Coryton v. Hellier* (1) was only the case of an omission of words, certainly intended to have been inserted, and Lord *Hardwicke* thought he could correct it. This is a case of construction only, not a case of law. By the settlement, the equitable interest was given to the husband for life, remainder to the wife for the residue of the term; and I cannot narrow the interest given to her, her executors, administrators, and assigns. (2) But the reversionary lease must be assigned to the plaintiffs (3) on payment of costs.

(1) Lately reported, 2 Cox, 340.

(2) The bill was dismissed, as to the original lease, with costs. Reg. Lib.

(3) At their expence. Reg. Lib.

1788.

CLARKE
against
HACKWELL.

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WALCOTT against HALL and Others.

(No Entry.)

JOHN PEARCE, by his will dated 14th of November 1771, (int. al'.) bequeathed to his godson *Thomas* the plaintiff, the sum of 50*l.* to be paid to him at the age of 21 years, or day of marriage, which should first happen, the same to be put out at interest in the name of his executors and administrators, the interest arising therefrom from time to time, to be applied towards his maintenance and education; and if he should die

proved under the commission, his cestificate therefore a bar, and the residuary legatees not liable. (2)

(1) *Vide Hoath v. Hoath*, ante, p. 3., and 1 Roper on Legacies, 182. et seq.

(2) See *Orr v. Kaines*, 2 Ves. 194. and Supplement, 324. *Moore v. Moore*, 2 Ves. 596. 600. *Anon.* 1 P. W. 495. and Mr. Cox's statement of the principal case, in his note to the 5th edition, *postea*, note (3). Lord *Redesdale*'s notes refer to a case of *Malin v. Hooper*, 19th March 1797, and add, "where a legatee ought to refund, it must be in cases where the payment at the time of making it would amount to a devastavit."

*Master of the
Rolls for Lord
Chancellor.*

*Lincoln's Inn
Hall, 23 Feb.*

*Legacy to A.
payable at 21 or
marriage, with
interest, a vested
legacy (1), and
executor having
become bank-
rupt, might
have been*

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WALCOTT
against
HALL.

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before 21 or marriage, he gave the legacy to his executors in trust for the poor of Stoke, and gave the residue of his personal estate to three married women, who with their husbands were defendants, and appointed the defendant *Charles Pearce Hall* executor.

[*] The testator died in 1772, and the defendant *Hall* proved the will, retained 50*l.* for the payment of the legacy to plaintiff, and paid over the residue (after payment of debts and other legacies) to the residuary legatees, and afterwards became bankrupt, and obtained his certificate.

The plaintiff, having attained his age of 21, filed the present bill against the executor, and residuary legatees, for payment of the legacy, or an account of the assets of the testator.

Mr. *Schwyn* and Mr. *Mitford* (for the plaintiff) contended, 1st. That the residuary legatees are liable, in default of the executors, to the payment of this legacy. If an executor becomes insolvent, the legatees paid by him voluntarily must refund. 2 Vesey, 194. The distinction is between a voluntary and a compulsory payment. 1 Wms. 495. The residuary legatees were bound to see to the payment of this legacy. If lands had been charged, and the executor did not pay the legacy, the lands would be liable: so if a leasehold estate, which had been assigned to the legatee, yet if a pecuniary legacy was unpaid, it would be assets.

2dly. The demand on the executor still subsists, and is not barred by his bankruptcy and certificate being in *alio jure*: this could not be proved under the commission, as a debt. Being given over in case of his death under 21, it was not a vested legacy.

But his Honor said (3), the residuary legatees could not be liable. (3) If they had filed a bill for the residue, the court would have ordered payment of it, without any appropriation of the 50*l.* (4): the residuary legatees have received no more than they had a right to. If it had been a debt, the party must have rested on the devastavit.

2dly. This was a vested legacy, and as such might have been proved, under the case of *Green v. Pigot*, (*ante*, v. i. p. 103.) The giving interest always vests personal legacies. It was therefore vested, subject to be divested on the legatee's dying under 21, and although it might not have been proveable as a debt, yet the guardian upon petition would have been permitted to prove it. The certificate must bar this, as it makes the bankrupt a new man.

Bill dismissed without costs.

(3) Mr. Cox states the judgment thus in his 5th edition, 1 P. W. 495: — "His Honor said, the residuary legatee could not be liable. That the distinction was between the cases where there was originally a deficiency of assets, and where the executor had wasted them. In the former cases, a legatee, who had been paid more than his proportion, must refund to the others: but here the residuary legatees had received no more than they were entitled to, and the executor was therefore the only person to be resorted to. And his Honor, being of opinion that this demand, against the executor, was barred by his certificate, dismissed the bill."

See also Lord Redesdale's note, *ante*, note (2).

(4) Lord Redesdale makes a query on this.

[*] *ELLISON and Wife against COOKSON.*

(Reg. Lib. 1787. A. fol. 247.)

BILL filed by plaintiff and his wife, for a legacy of 5000*l.* left to the wife, by the will of her late father *John Cookson*, Esq.

The testator, by will 7th of *March* 1774, devised to his eldest son *Isaac Cookson*, certain freehold and copyhold estates, and continued as follows, "As to all my other lands, goods, and chattels, of what nature or sort whatsoever, I give to my dear wife *Elizabeth*, appointing her executrix of this my last will, with the tuition and education of all and every such youngest children, and to provide for them, with regard to their fortunes, as they may deserve and merit." To the will he added a paper, of the same date, called *instructions to my wife, with regard to my younger children*, wherein, after directing fortunes for his younger sons, he says, "My daughters *Hannah* (the plaintiff) and *Sarah* to have 5000*l.* each; all the surplusses over and above your own expences to be laid out in mortgages or purchases for the purposes before mentioned." — By an additional codicil, on the same paper, and of the same date, he says, "I do further add to what I have said on the other side, that what savings or increase I may make, or my dear wife may make of my effects, she may give and dispose of the same, either in her life-time or by will, to such of her children as she sees proper." The testator died in *December* 1783, without revoking the said will and codicil, which were proved by the defendant, the widow, in the ecclesiastical court.

After the date of the will, viz. about *September* 1776, a treaty of marriage being on foot, between the plaintiff *Richard Ellison* and the co-plaintiff his wife, Mr. *Buck*, brother-in-law to Mr. *Ellison*, was desired by Mr. *Ellison* senior, the father of the plaintiff, to go to Mr. *Cookson*, the co-plaintiff's father, to acquaint him with the provision intended by Mr. *Ellison* senior for his son, and to learn from Mr. *Cookson* what he meant to give his daughter; when Mr. *Cookson* informed Mr. *Buck* (as he swore in his evidence) that he meant to give his daughter *Hannah* (the co-plaintiff) [*] 5000*l.* upon her marriage, and intended to give her a further sum equal, or nearly equal thereto, upon his death; but refused to settle or specify the sums. In the course of the treaty between Mr. *Buck* and Mr. *Cookson*, several letters passed, and in one of them from Mr. *Buck* to Mr. *Cookson*, dated 5th of *October* 1776, and which was received by him, Mr. *Buck* says, "Mr. *Ellison* (the father) says — as he hopes the provision you told me and Mr. *Richard Ellison*, you intended making for Miss *Cookson* at your decease, will be equal, or nearly so, to what you propose giving upon the marriage, he shall rest perfectly satisfied with your word for fulfilling that engagement." In answer to this letter, the testator wrote to Mr. *Buck*, and in the letter said, "you must mistake Mr. *Ellison* in regard to any such declaration as you mention; the mistake may arise between what may be possible and probable; I told him my present plan, which would be executed by my wife, if the longer liver." (2)

In *February* 1777, the plaintiffs intermarried, and, on the 14th of that month, the plaintiff *Richard* received from Mr. *Cookson* the sum of 5000*l.* and gave a receipt for the sum, as for his wife's portion.

1788.

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[*Vide* S. C. ante, 252. and decree affirmed on appeal, post. 3 vol. 60. 1 Ves. jun. 100. and 2 Cox, 220.]

Master of the Rolls for Lord Chancellor.

Lincoln's Inn Hall, 27 Feb.

Parent paying a portion is presumed to mean to perform the gift of a legacy; unless there be sufficient evidence to repel the presumption. (1)

[*308]

(1) See Lord *Eldon* C.'s observations on this case, 7 Ves. 515. 517, 518.

(2) See per Lord *Eldon* C. 7 Ves. 517, 518.

1788.

ELLISON
against
COOKSON.

The question was whether the portion was, or was not, an ademption of the legacy.

Mr. Mansfield, Mr. Madocks, and Mr. Lloyd, for the plaintiffs.— The testator did not mean to revoke the legacy given by the will. *The evidence of Buck proves this*, and his own letter only shews that he did not mean to be bound to give a definite sum. He uses possible and probable, in contradistinction to a positive engagement. It would be necessary, in order to shew the legacy to be adeemed, that the court should be able decidedly to say, that *Cookson* intended to give no more, which cannot be in this case. It is true, that it is a general presumption, where a father gives a legacy, and afterwards pays the same sum as a portion, that he means by that to pay the legacy; but evidence may be given to repel that presumption, and slight evidence has been held sufficient for that purpose. It is not necessary the promise should be to give a definitive sum. In *Debeze v. Mann*, ante, 165. the evidence was much slighter than in the present case. It was only that *Macguire* said, "he could only give her [*] 1000*l.* on her marriage, but there would be more hereafter, as his life was a bad one. Lord Chancellor's observations in that case are applicable to *Buck's* evidence in this. There is no hardship in this case, as a large residue is left in the power of Mrs. *Cookson*, who may make the other sister's share equal Mrs. *Ellison's*. By *his present plan*, the testator clearly referred to the first codicil, in which this legacy is given, and certainly did not mean to adeem it.

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Master of the Rolls.— This is one of the clearest cases I ever met with; I am sure that, in deciding on the technical rule, I shall effectuate the intention of the testator. A variety of cases have established the rule in general, that where a father has given a legacy, and afterwards pays a portion, it is a [satisfaction] of the legacy, and that evidence may be admitted to repel the presumption. It seems to be a good rule, and I have no inclination to alter it. The only question is, whether this is evidence to repel the presumption. It is certain the testator had some idea of a further possible provision. In his first codicil, he had made a provision for the children. In his last codicil, he has given the surplus to his wife, to divide at her pleasure among the children. Apply this to his letter, in which he says, "I told him my plan, which would be executed by my wife, if the longer liver;" which shews he meant to refer to what was to be done by the wife; and may be done hereafter. The ulterior provision he delineates by pointing to the provision to be made by the wife, though she is not obliged to give to each of the children. He has clearly expressed what he intended.

Bill dismissed.

[This decree was affirmed, upon a re-hearing, by Lord Chancellor, 9th March 1790, on the special circumstances which he enumerated in making his decree. See *postea*, 3 vol. 60. and 1 Ves. jun. 100.; *et vide* 7 Ves. 515. 517, 518.]

HEARNE *against* JAMES.

(No entry.)

BILL for specific performance of a contract for the lease of a house.

A paper containing the terms of the contract being produced in evidence, Mr. Scott objected to its being read, being unstamped. He said, under the last act, papers produced must be stamped, [*] whether they were obligatory, or only evidence. He cited the case of *Ford v. Compton*, *ante*, p. 32.

His Honor said he remembered a case, at the *Monmouth* assizes, where a tenant who had formerly held under an agreement for a lease, but had held over as tenant at will: and, in an action for rent, the agreement for the lease was produced, and the objection that it was not stamped was over-ruled, because it was not produced as obligatory, but merely evidence of the quantum of the rent at which the land was held while under lease.

But, upon considering the last stamp act, his Honor held, that the paper in this case must be stamped, for, wherever the terms are reduced into writing, the instrument must be stamped, though parol evidence might have been given of the terms of the contract.

(1) See *Ford v. Compton*, *ante*, 32. An agreement, however, need not be stamped, if admitted by the answer.

TAYLOR *against* HAYLIN.

(Reg. Lib. 1787. B. fol. 259.)

A BILL for an account of money paid, and that the defendant might repay so much as he had received above what was due upon a security given by plaintiff to defendant for 1000*l*.

Mr. Scott (for the defendants) objected to the bill, that it was a bill to open a settled account without stating particular errors.

Mr. Mansfield (for the plaintiff) said it was not to open a settled account, for there had been no account settled. It was only for an account of monies paid on a lumping security.

Master of the Rolls. — There is no rule in a court of equity, that a party for asking may have an account of monies paid. If the party has over-paid, he may have a remedy at law. It must appear there has been imposition in order to open an account here, otherwise every transaction might produce a chancery-suit.

[*] If you had stated specific errors in the account, I could have sent it to the Master. But a person who comes to unravel an account, must always shew clear grounds.

[The same point has been since determined on appeal from the *Rolls*, *Johnson v. Curtis*, *Trinity* 1791. — Mr. Brown's note.] (3)

(1) *Vide* S. C. 1 Cox, 435. *Chambers v. Goldwin*, 9 Ves. 266. and *Johnson v. Curtis*, Ch. 3d July 1791, from Lord Colchester's MSS. *postea*, in note (3).

(2) With costs. Reg. Lib.

(3) The Editor finds a report of *Johnson v. Curtis* taken by Lord Colchester, amongst his Lordship's MSS. It is as follows: —

P 3

" Johnson

1788.

*Master of the
Rolls for Lord
Chancellor.*

*Lincoln's Inn
Hall, 29 Feb.*

If the terms of a contract are reduced into writing, the paper must be stamped in order to be read in evidence though collaterally. (1)

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*Master of the
Rolls for Lord
Chancellor.*

*Lincoln's Inn
Hall, same day.*

[*Vide* S. C.
1 Cox, 435.]

Bill to open a settled account must state specific errors: [if this is not done, the plaintiff will not be admitted to prove them at the hearing.] (1)

[* 311]

1788.

TAYLOR
against
HAYLIN.

Account. —

1. On a bill to open a settled account, it is not sufficient to shew that the account was signed with "errors excepted."

2. Upon a general allegation of error in a settled account, without specifying particulars, it cannot be surcharged or falsified, although particular errors be proved in evidence.

" *Johnson v. Curtis*. In Chancery 3d July 1791. On appeal. Bill for an account of all dealings and transactions between plaintiff and defendant.

" An account had been settled and signed by the parties in 1783, errors excepted, and the balance of that account carried on to the present account, which was still current.

" The plaintiff charged that there were errors in the account signed in 1783, but did not in his bill particularise any errors.

" A particular error was proved in the cause.

" The *Master of the Rolls* decreed an account from the foot of the account in 1783, but did not give the plaintiff liberty to surcharge and falsify that account.

" The plaintiff appealed; and the *Attorney General*, *Mitford*, and *King* contended, that the decree ought to have given the plaintiff liberty to surcharge and falsify the account in 1783; that if that account was not to be considered as a settled account, but merely an account signed with exception of errors in it, and that if it were to be considered as a settled account, the plaintiff, by charging that there were errors in it, without specifying any particular error, might give evidence of particular errors, and so entitle himself to surcharge the account; that if the defendant had brought an action against the plaintiff for the balance of the account, the plaintiff might have given evidence of error in the account; and it would seem very extraordinary, that he should be in a worse situation in equity than he would be in at law. That if this were to be considered as a settled account, it had been owned by what had been done since it was signed, there having been a reference to arbitrators of all matters in dispute, and this settled account, with the other accounts, having been submitted by the defendant to the arbitrators.

" *Solicitor General* contended that the plaintiff, not having in his bill stated any particular error in the account settled in 1783, was bound by it, and was not entitled to surcharge and falsify it; and that the circumstances of an error having been proved in the cause, made no difference; because the defendant, not having notice by the pleadings of the error which was intended to be pointed in the account, had not had an opportunity of going into evidence upon that subject; and possibly must, if he had gone into evidence, have explained what was supposed to be an error.

" The Lord Chancellor said, it was a general rule that a settled account could not be surcharged or falsified, unless the plaintiff by his bill charged some particular error in it; and that this certainly was a settled account, and the circumstances of its being signed with exception of errors made no difference, that being always implied in the settlement of an account; and affirmed the decree." *From Lord Colchester's MSS.*

*Master of the
Rolls for Lord
Chancellor.*

*Lincoln's Inn
Hall, 1 March,
1788.*

[S. C. 2 Dick.
697.]

Plaintiff, lessee
of a colliery at
a rate of so
much *per* *wey*,
the colliery be-
coming not
worth working,
and plaintiff
offering to pay

for all the coal that could be got, relieved against the future rent, and the covenant in the lease to work the colliery, [upon equitable terms, of paying for all the coals remaining, and making a full satisfaction for the covenants, in case the landlord would accept the surrender of the lease.] (1)

SMITH and Others against MORRIS.

(Reg. Lib. 1787. B. fol. 749.)

BILL by the plaintiffs, representatives of *Chauncy Townshend*, Esq. deceased, lessee of a colliery from defendant.

By lease of the 24th of May 1769, the defendant demised to the said *Chauncy Townshend*, a piece of land in the parish of *Langevilack*, in *Glamorganshire*, part of a tenement called *Pwlyr Air*, and all the veins, &c. of coal or culm, which then were, or should be opened, in or under the said tenement, from the 26th of March then last past, for forty-five

(1) See the decree from Reg. Lib. *postea*, 315. This is most material, and is a strong instance (amongst the rest) of the necessity of a revival of Mr. Brown's Reports with the Registrar's Books.

Mr. Dickens refers to the dictum in *Aylet v. Dodd*, 2 Atk. 238. as mentioned on the above occasion, 2 Dick. 697.; although he has mistaken the name. It should seem the Court could not act compulsorily in such a case, since a lessee remains liable during the whole lease. *Vide* 8 Ves. 95. As to where the Court relieves in cases of forfeiture, &c. and where not, see *Wadman v. Calcraft*, 10 Ves. 67. 12 Ves. 334. *Davis v. West*, *ibid.* 475. *Sanders v. Pope*, *ibid.* 282. *Sparks v. Liverpool Water-work Company*, 15 Ves. 428. 435. *Hill v. Barclay*, 18 Ves. 56. 60, &c. *Et vide Reynolds v. Pitt*, 19 Ves. 134, &c. &c. and the references.

years,

years, at the yearly rent of 9s. *per annum*, for the piece of land, and 30s. *per acre*, for the rest of the tenement, which should be used on the surface thereof for the purposes of the colliery, and paying in respect of the coal-works to defendant, &c. 9s. 6d. for every wey of coals or culm, which should be wrought, raised, or landed (except as therein excepted), the said rent to be subject to such deductions as after-mentioned, *viz.* that if the lessee should in any year use or sell more coal or culm, for which he was to pay in money than 1000 weys, he was to pay only 9s. *per wey* for the overplus, provided the defendants had received 9s. 6d. *per wey* upon 1000 weys, for every year the lessee should have worked. And the lessee covenanted in the lease, that he would diligently, at his own costs, try for veins of coal, and use his utmost skill to come at the same, and get into working thereof, within three years, by such pits, engines, &c. as were usual, and would, within one month after he should have sunk such a pit, constantly (unless hindered by unavoidable accidents) work and raise 900 weys of coal yearly, if so much good merchantable coal might be had out of the same; and in case so much coal cannot be had (without working the pillars necessary for supporting the work) would pay to the defendant, &c. 9s. 6d. for every wey of coals, which he, &c. should neglect to raise, and which should [*] be deficient of such quantity of 900 weys; the money for the deficiency to be paid for at the end of every year, and if he should neglect to sink a pit within three years, he should pay the defendant 9s. 6d. *per wey* yearly for 900 weys, until he should have sunk such pit. And there was a proviso in the deed, that in case with using due diligence, there should not be found a sufficient quantity of coal to work 900 weys a year, or if the lessee during the term should have worked all the coal, except the necessary pillars for the supporting the work, from thenceforth the lessee should be discharged from the covenant, for working 900 weys of coals a-year, and from all payments by reason of not working the same. And there was also a covenant, that the lessee should be at liberty to work and burn coal in the fire-engine. And there was also a covenant, by which the lessor was to be supplied with coal for his family, at the expence of getting the same.

Chauncy Townshend, the lessee, died in 1770, and by his will and subsequent transactions the lease became the property of the plaintiffs, who made trials for coals on the land, but could not sink a pit within the three years, but in 1772 began to sink a pit, which was completed in 1778, and in that year raised 1147 weys of coals, in the next year 1000 weys, for which the defendant was paid at the rate of 9s. 6d. *per wey*. The plaintiffs continued working the colliery till 1780, when very great breaks and faults happening in the veins, rendered the working more expensive than was conceived at the time of taking the lease, inasmuch as greatly to exceed the value at which the coals could be sold, by which they sustained a loss of 40s. *per day*, on which account they stopped working the colliery, and conceiving that, under the covenant in the lease, they were discharged from payment of the rent, ceased to pay the same. The defendant, in *Trinity* term 1782, brought an action, and assigned seven breaches besides that for not working the mine; which were all given up at the trial, but upon that for not working, although the plaintiffs proved the unavoidable accidents above stated, the jury gave a verdict for the defendant, and assessed the damages at 427l. 10s., which were paid; he afterwards, in *Hilary* term 1784 brought another action, and recovered a verdict on the same breach, with 534l. 7s. 6d. damages; and in *Trinity* term 1785 brought two other actions, and [*] threatened to bring similar actions every year. The plaintiffs therefore filed the present bill, charging that, under the circumstances, they were not compellable to work the mine, and that even if they had

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worked it, the mine would before the filing of the bill have been exhausted except working the pillars; therefore, that it is contrary to justice that the defendant should avail himself of the accidents which had happened, but that, upon the defendant's being paid for so many coals as could be got, he ought not to require any further payment under the lease. The bill therefore prayed an account of the quantity of coals capable of being raised, allowing necessary pillars to support the works, and for a fire-engine; and, in case it should appear that the defendant had received a sum equal to the rent, payable by virtue of the lease for the same, that he should be restrained by injunction from bringing or prosecuting actions for the rent, or if it should appear, that he had not been fully paid, then, upon payment of so much as he should be unpaid, he should be restrained in like manner.

Mr. Mansfield and Mr. Mitford (for the plaintiff). — The prayer of the bill is, that upon payment for all the coals that could be got, the defendant shall be restrained from bringing actions. The spirit of the contract entered into between the parties was that Morris should be paid at the rate of 9s. 6d. *per wey* for all the merchantable coals there could by due diligence be raised out of his ground. If he is paid for all, he has the whole benefit of the contract. The coal was not to be paid for till raised; therefore there are stipulations in the contract to compel; 1st, the trying for coal; 2dly, the working it as long as there should remain any coal in the mine. Those stipulations are in the nature of penalties, and may be relieved against if the defendant has a compensation for them. If he is paid for the coals, the spirit of the contract is performed. In such cases the court has relieved; as for instance, by payment of interest for a sum delayed to be paid. *Aylet v. Dodd*, 2 Atk. 238. As the verdict is entered, we are prevented from arguing that no more coal can be got, but it will be so expensive to get it that it is better for us to pay the value, without getting the coal; to compel us, in that case, to work the mine, or pay the rent during the term, would be to take advantage of the misfortune. If the mine had been worked out, the rent was to cease. The intention of the parties never could be, that the defendant was [*] to get more by the mine being a bad one, than by its being a good one.

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Mr. Scott and Mr. Richards (for the defendant). — The contract was that Morris should have so much money as the quantity of coal should produce, at so much *per wey*. This appears from the covenant that if the lessee did not work the mine for any year but paid rent for it, and in a subsequent year worked it to a greater amount than 900 weys, he might retain the rent for coal which he had not got in the former year. But suppose he had not worked it for two years, but paid the rent, and then in one year had worked the mine out, and it had not produced 1800 weys, could he have called on the lessor to refund what he had paid above the price of the coals obtained? Yet that would be the consequence if the spirit of the contract was as contended for on the other side. But contracts for mines differ from other contracts; a great deal of speculation enters into the constitution of them; they are frequently for the purpose of working other mines, and leaving those contracted for dormant, at a dead rent. The lessee here appears, by the covenant, to be treating with respect to his concerns in other mines. The parties have decided the only means to ascertain the quantity to be by working the mine; a court of equity has nothing to do with it, and cannot substitute a less accurate method of ascertaining the quantity; it would not be doing justice between man and man. If it was otherwise, the situation of a lessor would be a situation of great hazard, that of the lessee not so, as he would have the chance of all his speculations. The first covenant in the *reddendum* is to sink the pit, and if he does not to pay a dead rent at the rate

rate of 900 weys. But the covenant that in case with due diligence there should not be found coal sufficient to work 900 weys, or the coal should all have been worked, the rent was to cease, is decisive. Was it to cease without due diligence being used, and to be relieved by a new speculation in a court of equity? Another covenant is, that he shall deliver good coal for *Morris's* use, for firing. If *Mr. Morris* is only to be paid for the coal, how is the firing to be supplied? It will be contended, that a compensation can be made for it; but it shews the intent of the parties, that the value of the coal was not intended to be the only benefit to be derived by the defendant from the lease, and that the coal was really to be gotten, which it would have been, [*] but for negligence on the part of the plaintiffs. In fact, *Morris* offered, before this fault happened, to accept the surrender of the lease, to which the plaintiff would not then agree, so that he has very little equity now to compel the acceptance of it.

Master of the Rolls. — I cannot bring my mind to balance upon this subject. A court of equity must forget its name, if it did not interfere in a case so circumstanced. The contract was, as *Mr. Mitford* stated it, a contract for all the coals contained in the land at 9s. 6d. per wey. *Mr. Scott* said, that if a court of equity interfered, it would not be doing justice between man and man. If it would not be so, I must much mistake the nature of the object. If any possible disadvantage could arise to *Mr. Morris*, I would not interfere. It is true, if parties enter into legal contracts they are bound to fulfil them. But if parties enter into contracts which are enforced for purposes of harassment and vexation, courts of equity properly interfere. *Smith* calls upon the court to interfere, because if he carries the contract into execution, he must pursue the object at a greater expense than he can gain by it, the property being either not attainable, or attainable only at an intolerable expence. Admitting it to be attainable in this way, the offer to pay *Morris* all he could ever obtain with incurring the expence, is offering him every thing he can fairly require. What disadvantage will it be to him? He will be paid for the coals, although they will be left upon the estate. It is clear, *Mr. Smith* cannot be compelled to go on with a disadvantageous business, from which *Morris* is to derive no advantage.

It must be referred to the Master, to enquire what quantity of coals remain to be got upon the estate on the terms in the lease (2); and, the plaintiff undertaking to pay for the same as aforesaid, and to surrender the lease, the defendant must be restrained from proceeding in his actions.

(2) The decree, however, proceeded thus: "And what is the value of the same at the rate of 9s. 6d. a wey; and the plaintiffs undertaking to pay what shall be such value, and likewise to surrender up the lease, in case the defendant will accept the same. It is ordered and decreed, that they do pay annually the sum of 427l. 10s. agreed to be paid by the said lease, as the same shall become due, into the Bank, with, &c. without prejudice, subject to the further order of this Court. And in case the defendant shall accept a surrender of the lease, it is further ordered, that the Master do enquire and state what will be a full satisfaction to the defendant of the covenants in the said lease." Reserving costs and further directions. Reg. Lib. p. 751.

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against
MORRIS.

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[Vide S. C.
1 Cox, 438. for
the judgment.]

Lincoln's Inn
Hall, 3 March.

There being a provision in a settlement of 5000*l.* for a child at 21, the father by will added 5000*l.* more, and charged all on a residuary real fund, which he had also made liable to debts and legacies, in aid of his personal estate: the charged estate shall not be exonerated by the personal estate. (1)

[*] WARD against Lord DUDLEY and WARD.

(Reg. Lib. 1787. B. fol. 278.)

UPON the marriage of the late Lord *Dudley* and *Ward* with *Mary Carver*, his second wife, a settlement was made by indentures, bearing date 29th and 31st *December*, 1744, whereby a messuage, called *Willingsworth Farm* and other premises in *Staffordshire*, were conveyed to trustees, to the use of the late Lord *Ward*, for life, remainder to secure to Lady *Ward*, a charge of 800*l.* per annum, for life, remainder to trustees for a term, for raising portions for children; under which if there was but one child (which was the case, the plaintiff being the only child of that marriage) to raise 5000*l.* for such only child; to be paid at 21 or marriage after Lord *Ward's* death, with remainder to Lord *Ward*, in fee.

The late Lord *Ward*, by will dated 10th *June* 1765, devised the said messuage of *Willingsworth Farm* and other lands, comprized in the above settlement, to the present Lord *Dudley* (the defendant, his son, by a former marriage) in tail male, remainder to the uses of his will, with remainder to the plaintiff, in like manner. And also devised to the plaintiff divers lands and tenements, being other part of the land comprized in the above settlement, for life, with remainder to his first and other sons; with remainder to the defendant in like manner; with remainders over, and reciting that part of the lands devised might be included in the marriage-settlement, and subject to the charge of 800*l.* per annum, he made his lands, called the *Old Park* (which were not comprized in the settlement) chargeable with the annuity, as an indemnity against the insufficiency of the charged estates; and charged all the residue of his real estate, with the payment of all his debts, legacies, and sums of money which in that, his will, or in any codicil thereto, he the testator should give, bequeath, or direct to be paid, in case his personal estate should not be sufficient to discharge the same, which he did thereby will should be first applied for that purpose, and, subject thereto and to the jointure, he gave and devised all other his manors, &c. to the defendant for life, with remainder to the plaintiff for life, with remainders over; and, reciting that by the marriage-settlement he had agreed to settle 10,000*l.* as a provision [*] for younger children, or if there should be but one such child, then 5000*l.* he subjected and charged the last-mentioned estates to the payment, as well of the said 5000*l.* as of the further sum of 5000*l.* to the plaintiff, to make up his portion the sum of 10,000*l.* to be paid at his age of twenty-five years, with interest from testator's death, at 4 per cent. and, after payment of debts and legacies, gave the residue of his personal estate to the defendant.

Lord *Ward* died 6th of *May* 1774, leaving the defendant, his son, by his former marriage, and the plaintiff, his only child by *Mary Carver*, his second wife.

The plaintiff filed the present bill for payment of the two sums of 5000*l.* and 5000*l.* and insisting that the personal estate of the late Lord *Ward* was first applicable thereto.

The cause came on before the Lord *Chancellor*, 11th *July* 1787, when his Lordship ordered the two sums of 5000*l.* and 5000*l.* and the interest due thereon, to be raised by sale or mortgage of the residuary real estates of the testator, and gave proper directions for that purpose. Upon which the plaintiff presented his petition of appeal, contending

(1) See in *Lawson v. Hudson*, *antea*, 1 vol. 58, &c.

that

that the two sums, or at least one of them, was payable in the first place out of the personal estate.

The appeal now came on to be heard, when Mr. *Mansfield* and Mr. *Richards* argued for the plaintiff, and Mr. *Ray* for the infant son of the plaintiff, that the personal estate was primarily liable to the two sums of 5000*l.* and 5000*l.* or one of them.

The question is whether these sums are not, in the first place, a charge on the personal estate. The testator, by his will, discharges his charged real estates of the jointure, and throws it on another fund; he there charges the residue of the real estate with all legacies and sums of money, directed to be paid by the will. These sums are certainly both of them sums directed to be paid by the will; in fact they are both legacies, for the sum directed to be paid at 25, must be a different sum from that to be paid at 21, being a satisfaction for it. He must have intended them so, especially the new sum, which was [*] a direct legacy. As to the other which was charged, he might think that did not come under the term legacy; and thereupon added the words, *sums of money directed to be paid by the will*, in order to comprize it. His intention was to settle the residue of the real estate in strict settlement. He does not charge it in the first place, with the payment of debts and legacies, he merely charges it in aid of the natural fund, not by a direction that the taker of that estate shall pay them; and, being a mere charge, it can operate no further than a charge on failure of the personal estate, which will be liable to these sums, as it always is, primarily, to the payment of a legacy, notwithstanding its being charged on a real estate.

Lord Chancellor. (2) — I thought this case perfectly clear when it came on before, and, though I have now listened with great attention, it does not seem to me that there is any ground for argument; the testator says, "I charge the last-mentioned estate with the payment as well of the said 5000*l.* as of the further sum of 5000*l.*" This is clearly a *real* devise, it is purely a gift out of the real estate, and cannot fall on the personalty. The next question is, whether there are any phrases in the will which direct it to be paid out of the personalty; for this purpose, reference is had to the clause relative to legacies, because he has charged the residuary fund with *debts, legacies, or sums, directed to be paid*. The object of that charge was to make the real fund serve as a supply for those gifts which would not otherwise fall upon it. But it is contended, that this means to include a gift, which he had more clearly thrown on the real fund, and which never was charged on the personal estate. By the latter part of the will, he gives the personal estate, after payment of legacies, to the defendant. That shews the intention, that the 10,000*l.* should not be charged upon it. Can I, by an obscure clause, throw a further charge than that of debts and legacies upon it? Decree affirmed.

(2) See also the Lord Chancellor's judgment, as reported 1 Cox, 438.

[*] PRICE *against* JAMES.

(No entry.)

THE bill was for discovery and relief, in a case where the plaintiff was entitled to a discovery only. The defendant demurred generally, ing discovery and relief, where the relief is at law. (1)

(1) This is the sound determination; and, therefore, *Fry v. Penn*, *antea*, 280. is not law. See the references in the Editor's note there, especially to *Collis v. Swayne*, *post*. 4 vol. 480. and to 6 Ves. 63. 686. 8 Ves. 3. 9 Ves. 71.

and

1788.

WARD
against
DUDLEY.

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Lincoln's Inn
Hall, 5th Mar.
[S. C. 2 Dick.
697.]

General de-
murrer allowed
to a bill pray-
ing discovery and relief, where the relief is at law. (1)

1788.

PRICE
against
JAMES.

and Lord *Chancellor*, after a very slight argument that such a demurrer was irregular, and that it should have been a demurrer to the relief only, allowed the demurrer, saying he had had occasion to consider this subject very much lately, and that he thought it incumbent on the plaintiff to shape his bill according to what he had a right to pray.

LAWRENCE against WALLIS.

(Reg. Lib. 1787. B. fol. 323.)

*Lincoln's Inn
Hall, 7 March.*

Feme covert, under a power, makes a will; afterwards, becoming dis-covert, she takes a conveyance from the trustees to her own use. This is a revocation of the will. (1)

BILL for specific performance of an agreement to purchase the estate in question; upon the hearing it was referred to the Master, to enquire whether the plaintiff could make a good title. He reported that the plaintiff could not make a good title, and it came on now upon an exception to the Master's report.

The case was as follows:—*Hester Spencer*, previous to her marriage with the late Mr. *Dingley*, by indentures of 17th and 18th June 1760, conveyed the premises to trustees, in trust to convey the same to such uses as she, whether sole or covert, should by deed or will appoint. In 1765, being then covert, she made a will, reciting the power, and made conformable to it, by which she gave the premises in question, in case she should have no children, to her niece, *Dorothy Askew*, for life, with remainders, under which the plaintiff claimed the reversionary interest, subject to *Dorothy Askew's* life estate. After the death of her husband, Mrs. *Dingley*, by a conveyance for that purpose, reciting the power, and made conformable to it, directed the trustees to convey, and they conveyed the premises to herself in fee.

The question was, whether this conveyance was a revocation of the will.

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[*] Mr. *Stanley* (for the plaintiff) contended this was no revocation; for that Mrs. *Dingley*, by the conveyance from the trustees, took no new estate, but was seised of the same estate as she was before. If a person having an equitable estate, makes a will devising it, and afterwards takes a conveyance of the legal estate, that will not revoke the will.

But Lord *Chancellor* said, there was no doubt about it; the question is which of the acts is an execution of the power; there is no doubt it is executed by the conveyance to her own use. Exception over-ruled.

(1) That an appointment by will under a power is revocable, without the insertion of a power of revocation in the will or the instrument creating the power, see in *Lisle v. Lisle*, ante, 1 vol. 533. That it is otherwise as to a deed, see 4 Cruise, Dig. 174. 239.

[Vide S. C.
2 Ves. jun. 673.
and 2 H. Black.
Rep. C. P.
399.]

*Lincoln's Inn
Hall, 7 March.*
A child in ventre
sa mere, at
the death of A. shall take as a child living, at the death of A. (1)

CLARKE against BLAKE.

THE testator devised the premises in question, "to the use of such child or children of his brother *Henry Clarke*, whether male or female,

(1) The question was not settled until the year 1795, when it was determined in the principal case, by the solemn judgment of the Court of C. P. that the infant en ventre sa mere

"female, as should be living at the time of his said brother's death, as tenants in common, and not as joint-tenants."

The question was, whether *Bridget*, one of the children, being unborn, but in *ventre sa mere* at the time of the brother's death, should take a share, or be excluded.

Mr. *Scott* contended that the child in *ventre sa mere* should take. Such a child is always considered as if it were born, in cases which are for its benefit. There are many authorities for its being so considered, as *Beale v. Beale*, 1 Wms. 246. where it is said, "It would be hard in a court of equity, that such a child, because it happened not to be born at such a time, must therefore be unprovided for. At law such a child may be vouched, and the mother may be guilty of the murder of such a child if she takes poison; and there is more reason in equity for considering such child as born." So in the case of *Burdet v. Hopegood*, in the same book, p. 486. where the testator devised the premises, in case he should have no son at the time of his death, to the defendant. The testator died, leaving his wife *privement ensient* with the plaintiff, he was held to be a son living at the testator's death, the court of King's [*] Bench being unanimously of opinion, that though not born, he had an existence in the eye of the law. The same point was determined in *Northey v. Strange*, 1 Wms. 340. There can be no difference in its being a devise to the use of the children and its being a direct devise to them. Upon the birth of the posthumous child, the estate of the other children would open to let in her interest.

Mr. *Madocks* and Mr. *Graham*, for the children born at the time of the brother's decease.

His Honour, the *Master of the Rolls*, in a late case of *Cooper v. Forbes* (*ante*, p. 63.) would not permit a child in *ventre sa mere* to take under a bequest to children living at the death of the testator; and upon the cases being mentioned, he referred to that of *Peirson v. Garnet*, where he had held the child in *ventre sa mere*, not to take, (*ante*, p. 47.) and said he thought himself bound by his own authority.

Lord Chancellor. — I admit the child is not within the strict meaning of the words: but the solid ground of construction is to consider whether she is not within the intention of the testator to provide for all the children of his brother. I will talk to his Honour on the subject, and if he persists in his opinion, the question must go to law, and be tried in an ejectment. (2)

were was entitled to take a share; and that, generally, such infants are considered as born for all purposes which are for their benefit. See the report Doe dem. Clarke v. Clarke, 2 H. Black. 399. and the principal case on the equity reserved, 2 Ves. jun. 673. See also 1 Roper on Legacies, 88, 89, 90.

(2) *Vide 2 H. Black. 399. and the preceding note.*

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CLARKE
against
BLAKE.

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BROWN against DUDBRIDGE and Others.

WILLIAM BROWN, by will, gave to his nephews *William Brown* and *William Watson* 700*l.* to be divided between them when they should arrive at their ages of 21 years; but in case either of them should die before he attained such age, then the whole to be paid to the survivor, upon his attaining such age; and in case they should both die before attaining such age, then the legacy was given over to several of the defendants; and made his wife executrix. The testator died in 1764, the widow proved the will, and possessed herself of the effects. The testator's nephew, *William Brown*, died in [*] his life-time, and the

*Master of the
Rolls for Lord
Chancellor.
Lincoln's Inn
Hall, 10 March.
The Court will
not interfere,
even to secure
the fund, upon
the application
of a person who
does not shew
any title.*

[*322]

1788.

BROWN
against
DUDBRIDGE.

the bill stated that *William Watson*, the other legatee, went abroad about a fortnight before the testator's death, having then nearly attained his age of 21; that he attained such age, and has never since been heard of, from whence it is to be concluded that he is dead; that the plaintiff is his cousin, and next of kin; and therefore prayed that the defendant might pay the money in her hands into the Bank, in the name of the Accountant-general, in order to secure the same to be paid to the said *William Watson*, if he should ever claim the same, or, if not, to the plaintiff as his representative.

The defendant, by her answer, admitted the death of *William Brown*, testator's nephew, in his life-time, and that *William Watson* attained his age of 21, but said she had heard he died after attaining such age, leaving his father him surviving. — But no notice was taken of her answer in disposing of the motion.

Mr. *Spranger* moved, on the part of the plaintiff, that the executrix might be ordered to pay the money into court, in order to secure it during the pendency of the cause; the presumption being that the legatee was dead, and that, therefore, the money belonged to his representative; the sole object of the bill being to secure the fund for such person as might ultimately appear to be entitled to it. He cited *Morgan v. Harris* (*ante*, p. 121.) to shew that the court would secure the fund upon the application of a party who had not taken out administration.

But *his Honor* said that was a very different case, the plaintiff here not having administered, nor shewing any title; therefore,

Refused the motion.

SETCOLE against HEALEY.

(Reg. Lib. 1787. B. fol. 144. b.)

*Lincoln's Inn
Hall, 11 March.*

Money (the sum being small) ordered to be paid to assignees of a bankrupt, on the bankrupt's petition without a supplemental bill.

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*Lincoln's Inn
Hall, 12 March.*

[Erroneously reported here, and in 2 *Dick.* 697. where it is contrary to the facts.] (1)

The husband of a feme executrix, commits a devastavit, and becomes bankrupt, the wife is not liable. (1)

MONEY being ordered by a decree to be paid to the plaintiff, who afterwards became a bankrupt, he and the assignees applied, by petition, that the money might be [*] paid to the assignees. No supplemental bill had been filed, and Mr. *Lloyd* suggested as the reason, that the sum was so small (only about fifty pounds) that it would not bear the expence of a supplemental bill. Lord *Chancellor* ordered it to be paid to the assignees, on the petition of the bankrupt. (1)

(1) The petition was that of the bankrupt and his assignees. Reg. Lib.

BEYNON against GOLLINS.

(Reg. Lib. 1787. A. fol. 354.)

EDWARD FREPOUND, the elder, by will March 8th, 1754, gave to his daughter *Elizabeth*, one of the plaintiffs, 1500*l.* charged on

(1) The wife could not have been chargeable in this case, for the reasons stated by Lord *Redesdale* C. which are afterwards noticed; and there seems a gross mistake as to the dictum attributed to Lord *Thurlow*, at the conclusion of the report of his judgment *postea*, the whole report being a most erroneous one. Setting aside the case of a husband's

on his real and personal estate, and made his son *Edward Frepound*, the younger, sole executor. The plaintiff *Elizabeth*, afterwards, in January 1762, intermarried with *John Beynon*, and 800*l.* part of the 1500*l.*

1788.

BEYNON
against
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band's *bankruptcy*, and substituting the case of a husband's death, it seems that a woman, who, in conjunction with her husband, has wasted assets which she had to administer, and afterwards survives her husband, may be chargeable for the devastavit to the extent of the insufficiency of the assets of her husband. See the important case and admirable report of *Adair v. Shaw*; before Lord Redesdale C. in Ireland, 1 Scho. and Lefroy, 243, &c. Lord Redesdale in that, adverting to the principal case, says, *this report is erroneous, and the report of Mr. Dickens is directly contrary and equally erroneous. Vide 1 Scho. and Lefr. 259.* The editor thinks he cannot make this work more useful than by giving his Lordship's observations and statement of the case from his recollection; and by then giving a summary and faithful transcript of it from the Registrar's book, in one connected point of view. Lord Redesdale says, "When I look at the nature of the case of *Beynon v. Gollins*, I must say that what fell from Lord THURLOW (if indeed he did say what is attributed to him) was delivered without much consideration at the moment; for the great question in that case was, whether the defendant *Gollins* should be responsible in respect of acts which he had done, affecting the real, and not the personal estate. The note in *Brown* is clearly erroneous in many points, and the note in Mr. Dickens's book is directly contrary, and equally erroneous, according to my recollection of the case. The note is a perfect authority for charging Mrs. Shaw; but I believe no such decision took place as that attributed by Mr. Dickens to Lord THURLOW, and no such dictum was pronounced as that in *Brown*. That was in reality the case of a debt, and the debt was proved under the commission of bankruptcy, so that it might be considered as recovered; and the question was whether the wife was discharged by the bankruptcy of the husband; for the action against him was gone, except so far as there was a debt which might be proved under the commission; and, having been proved under the commission, the right of action was satisfied; that was the effect of the case, and the present point could not have arisen in it, except by way of argument. Besides, no action at law could have been maintained in that case, as it was the case of a legacy. Lord THURLOW could not have directed an account to be taken against the wife, because, as I apprehend, the bankruptcy of the husband discharged the demands; at least, it has been so contended; and the debt having been proved against the estate of the husband, it was *pro tanto*, recovered from the husband, and could not be demanded against the wife."

Lord Redesdale stated the true circumstances of the principal case from his recollection, to have been these: "Mrs. Beynon was entitled to a large sum charged on the real and personal estate of her father, part of which, viz. a sum of 800*l.* was settled on the marriage of Mrs. Beynon, which 800*l.* was a debt out of the assets of her father; the assets were possessed by her husband and her, as administratrix *de bonis non* of her father, and was administered by the husband to every extent except payment of that debt, and then he became bankrupt. There was a large real as well as personal property, and the husband together with *Gollins*, who was the trustee in Mrs. Beynon's settlement, sold the real estate; and the wife and her infant son, after the death of the husband, filed their bill against the purchaser of the real estate, to charge it with the sum of 800*l.* The bill was dismissed, as against all the purchasers, and was retained against *Gollins* in consequence of his having been a trustee for this 800*l.*, and having concurred in a sale which had conveyed the real estate, discharged of this demand. Then *Gollins* insisted that the personal estate of the father was first answerable for this sum of 800*l.*, and that Mrs. Beynon was responsible in the first instance; and the question was whether he could have the benefit of the personal estate, so as to throw the demand against her: the determination of the court was, that he was responsible to the son, but not to her; and therefore the interest of the 800*l.* was not given to her against *Gollins*, but he was made to answer for the principal, so far as it had not been recovered under the commission as a debt out of the estate of Beynon the husband; for there had been proof of the debt by *Gollins* against the estate of the husband, which had been admitted, and a dividend made on it." His Lordship observed, "That decision goes no further than this, that *Gollins* could not throw the child on an insolvent fund, but that having concurred in a sale of part of the estate charged, he was bound to answer it: the abstract question was not at all before the Chancellor." See also 4 Ves. 134.

It appears from Reg. Lib. that the cause had been heard by the Lords Commissioners on the 20th May 1783, when (as Lord Redesdale observes, 1 Scho. and Lef. 259. note) the bill was dismissed with costs as against the purchasers. As to the rest, "Their Lordships declared, that the 1500*l.* to which the plaintiff *Elizabeth Beynon* was intitled under the will of *Edward Frepound* her father, and at the time of her marriage with *John Beynon* deceased, was payable, in the first place, out of her said father's personal estate, and

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1500*l.* given to her by her father's will, was settled on the marriage. *Edward Freepound* the younger, and the defendant *Gollins*, were the trustees in the settlement. In the same year, *Edward Freepound* the younger

" and it was further ordered, that it should be referred to the said Master, to inquire
" whether the assets of the said *Edward Freepound* the father, possessed by *Edward*
" *Freepound* his son, his executor, were sufficient to satisfy his debts, funeral expences,
" and the legacies given by his will. And it was ordered that the said Master should
" also inquire whether any part of the said personal estate was set apart to answer the
" sum of 800*l.*; and it was further ordered that the said Master should inquire whether
" any, and what part, of the personal estate of the said *Edward Freepound* the father,
" unadministered by the said *Edward Freepound* the son, had come to the hands of the
" said *John Beynon* and *Elizabeth* his wife, or either of them, and state in what manner,
" and to what amount, and at what time the defendant *John Gollins* received a distributive
" share of the personal estate of the said *Edward Freepound* the son; and their Lordships
" did declare that the dividends declared under the commission of bankruptcy issued against
" *John Beynon* and *Thomas Dibbs*, in respect of the debt of 800*l.* proved by the said de-
" fendant *John Gollins*, ought to be applied in satisfaction of the said 800*l.* of which he was
" a trustee; and did order that it should be referred to the said Master, to take an account
" of what the defendant *John Gollins*, or any other person or persons, by his order, or for
" his use, hath or have received, or should thereafter receive, on account of such divi-
" dends; and it was ordered that the defendant *John Gollins* should pay what should
" be found due from him on the said account, into the Bank, with the privity of the
" Accountant-general, and that the same when so paid in should be laid out in Bank 3
" per cent. annuities, &c.; and their Lordships did reserve the question how far the defend-
" ant *John Gollins* was liable to make good to the plaintiff the infant the deficiency of the
" said 800*l.* either in respect of assets of *Edward Freepound* come to his hands, or on any
" other grounds; and their Lordships did reserve all further directions, and the consider-
" ation of the costs of the suit not before proved, and also the consideration of the costs
" before given, as between the plaintiffs and the defendant *John Gollins*, until after the said
" Master should have made his report." The said Master by his report, dated the 13th
" day of March 1786, certified (*inter alia*) " that the plaintiff *Elizabeth*, being at the death
" of her late brother, the said *Edward Freepound* the younger, the wife of the said *John*
" *Beynon*, and the only surviving child and next of kin of the said *Edward Freepound* the
" elder, she, as such, procured administration *de bonis non* to be granted to her by the
" ecclesiastical court of the Bishop of *Lichfield* and *Coventry*, and that she never inter-
" meddled in the administration of the personal estate and effects of the said *Edward*
" *Freepound* the elder, nor ever used any diligence or assiduity, or exerted any endeavours
" to collect, get in, or receive, any part of the said personal estate and effects, because she
" being under the absolute controul and command of her late husband *John Beynon*, he
" the said *John Beynon* took upon himself the whole conduct and management of the
" said administration, and without her privity or consent possessed himself of the whole
" personal estate and effects of the said *Edward Freepound* the elder remaining unadmini-
" stered by the said *Edward Freepound* the younger, and found that the said *John Beynon*
" soon afterwards becoming insolvent, two several commissions of bankrupt were issued
" against him, and he was thereupon declared a bankrupt; that several sums amount-
" ing to 187*l.* came to the hands of the said *John Beynon* deceased, as aforesaid; and
" that he had inquired in what manner, and to what amount, and at what time the de-
" fendant *Gollins* received a distributive share of such personal estate; but that he found
" that shortly after the death of the said *Edward Freepound* the younger, by indentures of
" lease and release, bearing date the 30th and 31st days of August 1762, and made be-
" tween the said *John Beynon* and the plaintiff *Elizabeth*, his wife, therein described to be
" only sister and heir at law of the said *Edward Freepound* the younger, deceased, of the
" one part, and the defendant *Gollins* of the other part, and by a fine levied in pursuance
" thereof, it was witnessed, that in consideration of 5*s.* a-piece to the said *John Beynon*
" and the plaintiff *Elizabeth*, his wife, paid by the defendant *Gollins*, and for settling and
" assuring the messuages and tenements therein mentioned to the uses therein limited,
" agreeable to the intent of the said *Edward Freepound*, respectively declared in his life-
" time; and for other good causes and considerations, the same messuages and tenements
" were granted and conveyed to the use of the defendant *Gollins* for life; remainder to
" the use of *Ann* his wife for life; remainder to the use of *John Gollins* the younger, son
" of the said defendant by the said *Ann* his wife, for life; remainder to the first and other
" sons of the said *John Gollins* the younger in tail; remainder to his daughters in tail;
" remainder to the use of the said *John Beynon* and the plaintiff *Elizabeth*, his wife, their
" heirs and assigns for ever: and further certified, that he found part of the premises
" comprized in the said indenture and fine was part of the freehold estate of the said
" *Edward Freepound* the elder, of which he died seized, and the remaining part of the

" said

younger died intestate; and letters of administration of his personal estates, and also administration *de bonis non* of *Freepound* the father, were granted to *Elizabeth Beynon* the plaintiff; and *John Beynon* the husband, in right of his wife, took possession of their effects. *Beynon* was in partnership in trade with *Dibbs*, and, having occasion for money, prevailed with *Gollins* to permit him to sell the estate of *Freepound* the elder; and *Gollins* joined with him in the conveyance of the estates to the purchasers; but *Beynon* received the money, and invested it in his trade; and, in 1771, a commission of bankruptcy issued against him and his partner; and *Gollins*, as surviving trustee, was admitted a creditor, and proved the debt of 800*l.* under that commission. *Beynon* afterwards died, and his widow and son filed the present bill, praying that the 800*l.* might be declared to be a subsisting charge on the real estate, in the hands of the purchasers, and that the defendants (and among them *Gollins* the trustee) should place out such sum to the uses of the settlement. The defendant *Gollins*, by his answer, insisted that no part of the purchase-money having come to his hands, he was not liable thereto; and the defendants, the purchasers, that being purchasers for a valuable consideration, and without notice, they were not liable to the charge.

[*] The cause had been heard, and a reference been made to the Master; and it came on now for further directions, upon the question whether Mrs. *Beynon*, the administratrix, was personally liable for the devastavit committed by her husband, he having become a bankrupt, and being since dead.

Mr. *Mansfield*, for the defendants, insisted, that the wife, administratrix surviving, was liable for the devastavit committed during the coverture by the husband, and for this he cited *Horsey v. Daniel*, 2 Lev. The devastavit of the husband is the devastavit of the feme, and so *vice versa* either of them, surviving is liable, Cro. Car. Marginal note to

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" said premises was the estate of the said *Edward Freepound* the younger; and further
 " certified, that the defendant *John Gollins*, on the 18th day of March 1778, received a
 " dividend from the estate of the said bankrupt, in respect of the said debt of 800*l.*,
 " amounting to the sum of 195*l.*, and that on the 9th day of April following the said de-
 " fendant invested the said sum of 195*l.* together with 5*l.* of his own money on the security
 " of two several mortgages or assignments of the tolls on the navigation from the river Trent
 " to the river Mersey, bearing an interest of 4*l.* 10*s.* per cent. per annum, which interest
 " was afterwards increased to 5*l.* per cent. per annum, from Michaelmas 1784, and he
 " found that the said defendant *John Gollins* received for interest of the said sum of 195*l.*
 " several sums, amounting together to the sum of 76*l.* 10*s.* 9*d.*, out of which the said
 " Master had thought proper to allow the said defendant *Gollins* the sum of 55*l.* 10*s.*
 " being so much from time to time paid by him to the plaintiff *Elizabeth*, for the mainte-
 " nance of her son, the plaintiff *Frederick Beynon*, leaving a balance of 21*l.* 0*s.* 9*d.*, which
 " being added to the said sum of 195*l.*, made in the whole the sum of 216*l.* 0*s.* 9*d.*,
 " which the said defendant had then in his hands on account of the said dividends. The
 " said Master, by his subsequent report of the 17th November 1787, certified that the
 " said *John Beynon* deceased, the late husband of the plaintiff *Elizabeth Beynon*, received
 " several sums amounting to 326*l.* 10*s.*, and that the said *John Beynon* received several
 " other parts of the personal estate of the said *Edward Freepound* the father, unadminis-
 " tered by *Edward Freepound* the son, in the decree named, besides what were mentioned
 " in his said report, but the same not being particularly specified, and having been since
 " wasted by him, the said Master could not particularize the same." The Reg. Book
 " then states, that the cause coming on the 5th and 6th of March instant, and also on the
 " above day, for further directions; and as to the matter of costs, " His Lordship doth
 " order that the defendant *John Gollins* do pay the sum of 583*l.* 19*s.* 3*d.* being the residuo
 " of the sum of 800*l.* into the Bank, with the privy of the Accountant-general of this
 " court, to be placed to the credit of this cause, subject to the further order of this court,
 " on or before the first day of next Trinity term: and it is further ordered that the de-
 " fendant *Gollins* do pay unto the plaintiff her costs of this suit, to be taxed by the said
 " Master. But his Lordship doth not think fit to give the plaintiff the costs over again which
 " were directed to be paid to the defendants T. S., T. J., A. P., W. H., G. A., E. B.,
 " A. B., and E. H., on the dismissal of the plaintiff's bill against them. And his
 " Lordship doth reserve the consideration of interest." R. L.

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Dyer,

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Dyer, 210. a. the feme shall be thrown into prison. Till the act of William 3. executor of an executor was not liable for the devastavit of the first executor; it was held to be a tort, and therefore to die with the party. 1 Lutw. But since the act, the executor of the executor is liable. An action would have lain against the husband and wife.

Lord Chancellor.—It is begging the question to say that where an executorship began after the coverture, the action for a devastavit would lie against both. I take it to be clear it would lie only against the husband, like an action of trover. If the husband took out an executorship in the name of his wife and died, and then she renounced, as she might do, she could not be liable to an action. The case in Dyer takes away the distinction of the executorship being before or after the coverture. It was formerly thought that a wife might, as an executrix, act alone, as she can in the civil law; and there is a case in Fitzherbert, tit. Executor, where it was so held; but it has since been settled otherwise. It was a hard rule that, if the husband of the executrix wasted, she, surviving, should be liable; but it never was held that where the husband took the executorship in the name of the wife she should be liable. (2)

(2) It seems, no such *dictum* took place as here stated, See 1 Scho. & Lefroy, 258, 259, 260. and the preceding note.

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[*] BIXBY against ELEY. [On further directions.]

[Vide S. C.
2 Dick. 698.]

(Reg. Lib. 1787. A. fol. 708.)

Surrender of
copyhold estate,
supplied for
creditors, tho'
there was free-
hold specifically
devised by the
same will. (1)

BILL by simple contract and specialty creditors of the testator, for payment of their debts; it stated that *Francis Eley*, by will, 20th January 1783, directed his copyhold estate to be sold, for payment of debts (2); and devised the house wherein he dwelt, to his wife in fee, and other freehold estates to trustees, until his daughter should attain her age of twenty-one years, to pay the rents, &c. for her maintenance, and after his daughter shall have attained her age, then he devised the premises to his said daughter in fee. The daughter was heir at law, and also customary heiress.

The copyhold not being surrendered to the use of the will, the bill [filed by a creditor on behalf of himself, &c.] insisted that the want of such surrender ought to be supplied. (3)

(1) See the circumstances more fully in the report, 2 Dick. 698.

(2) "Special and simple; and if there should be any residue, he willed his executors should place the same out at interest, until his daughter should attain 21, when the same should be paid to her; the interest during her minority to be applied for her maintenance: if she died before 21, he gave the principal to his wife. He then devised to his wife in fee, all his messuages, lands, &c. at *Thorpe*; and devised to his executors in fee, until his daughter should attain 21, all his messuages, lands, &c. at *Bratford*, in trust, to apply the rents, &c. for her maintenance; and when she attained 21, he devised these last-mentioned lands, &c. to his daughter in fee: but if she died before that, without issue, he devised the same to his wife for life, remainder to his brother for life, remainder to his nephew in fee-simple. He appointed his said brother and nephew, and his wife, executors; and gave the residue of his personal estate to his wife." Vide 2 Dick. 698, 699.

(3) A decree had been made in 1786 establishing the will, directing an account of the personal estate, and an application of it in payment of the debts; reserving the consideration, how the deficiency (if any) was to be raised. The Master's report stated a deficiency; upon which the cause came on for further directions on the 2d April, as above. Vide 2 Dick. *ubi suprad.*

The

The question was slightly agitated, whether the freehold, specifically devised, ought not to be applied prior to the copyhold so unsurrendered, which Lord Chancellor seemed to think it ought. (4)

But finally decreed the surrender to be supplied, and the copyhold estate sold, and the purchaser to hold and enjoy against the infant, unless she should shew cause within six months after she should attain her age of twenty-one years.

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(4) When the will came to be attended to, the testator's intention appeared evident that the copyhold estate should be applied in aid of his personal estate, to pay the deficiency; so as to leave the freehold estates free. Mr. Dickens, the Registrar, submitting, that if the freeholds were first applied, it would be taking from the widow the provision made for her, instead of assisting her, by the supply of a surrender; for which he cited *Drake v. Robinson*, 1 P.W. 443. *Tollet v. Tollet*, 2 P.W. 489. *Harris v. Ingledew*, 3 P.W. 91.

Mr. Dickens states Lord Thurlow to have been satisfied. *Vide ubi suprâ*. The decree is as follows, in Reg. Lib. : — " It appearing from the Master's report, that the testator's personal estate will be deficient to pay the remainder of the parties' costs, and what is due to the several creditors of the said testator, his Lordship doth declare, such deficiency ought to be raised out of the said testator's copyhold estates, devised by his will for that purpose; and that the defect in not surrendering the same by the said testator to the use of his will ought to be supplied. And it is ordered that the defendant S. E. spinster, the testator's heir at law, do surrender the same accordingly." The purchaser was to hold and enjoy, &c.

Ex parte PROSSER. [5th April.]

(Reg. Lib. 1787. B. fol. 150. b.)

Lincoln's Inn
Hall, 2d April.

THIS was a petition that *Charles Griffith*, an infant trustee, might be directed to convey the trust-estate under the act of *Queen Anne*. [7 Anne, c. 19.] The only doubt arose from the trust-estate being situate in the island of *Nevis*.

Infant trustee
directed to convey, [under the
stat. 7 Anne,
c. 19.] though
the trust-estate
abroad. (1)

Mr. Spranger, in support of the petition, said this order might be made, being a mere personal order on the trustee, and the words of the act general, and that it had been done under similar circumstances in a case of *ex parte Feueleteau* (2), 17th of November 1781, and lately, by his Lordship, in a case of *Bosanquet v. Hankey*.

Lord Chancellor, — On the strength of these authorities, and after some consideration, made the order.

(1) It is now quite settled accordingly. *Vide ex parte Anderson*, 5 Ves. 240. *Evelyn v. Evelyn*, 8 Ves. 96, &c.

(2) 2 Dick. 569.

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[*] EASTER TERM.

28 Geo. 3. 1788.

Master of the
Rolls for Lord
Chancellor.

Lincoln's Inn
Hall.

At a public
auction, the
seller's agent
bade for the
plaintiff: a spe-
cific perform-
ance refused
on that ac-
count. (1)

TWINING *against* MORRICE and Others. }
TAGGART *against* TWINING and Others. }

(No entry.)

JAMES WHITCHURCH, Esq. being seised of a copyhold estate, consisting of a mansion called *York-House* and lands, situate at *Twickenham Com., Middlesex*, held of the manor of *Isleworth Sion*, (except a small part which lay in the manor of *Twickenham*), and having surrendered them to the uses of his will, made his will dated the 21st of *December 1782*, and afterwards a codicil dated 1st of *March 1785*, and thereby devised the premises to the defendants, *Morrice, Taggart, and Addison*, in trust to sell the same, and to apply the money arising from the sale as therein directed, under which the defendant *Taggart* was beneficially interested; and appointed them executors. The testator died in *February 1786*, and the executors, being desirous of selling the estates in pursuance of the directions of the will, employed Messrs. *Skinner and Co.* as the auctioneers, who advertised the same for sale, and especially lot one, which was the mansion-house was in the conditions of sale described as copyhold of inheritance, held of the manor of *Sion* at a small quit-rent and fine certain, *which renders it equal in value to freehold*.

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Previous to the sale, it was agreed among the vendors that the first lot should not be sold for less than 2000*l.* and, if that should be sold for that price, the others should go for what they [*] could fetch. Mr. *Blake*, who was concerned as solicitor for the sellers, was present at that meeting, and knew what was settled with respect to the price, but was not employed by the vendors to bid for them, but other persons were employed for that purpose. Afterwards, at the place of sale, the plaintiff Mr. *Twining*, seeing Mr. *Blake*, held some conversation with him, and desired him to bid for the estate for him (Mr. *Twining*). (2) The lots were put up to sale, and Mr. *Blake* bid 1500*l.* for lot one, and afterwards, in consequence of one of the vendor's bidders bidding against him, he bid 2000*l.* at which price the lot was knocked down to him, and he, afterwards, bid for lot two 170*l.*, and for lot three 280*l.*, at which prices these lots were also knocked down to him, and he paid the deposit, according to the conditions of sale. No person bid at the sale but Mr. *Blake*, and the bidders for the vendors.

After the sale, the defendant *Addison*, one of the executors, found, among the testator's papers, deeds and writings, by which it was discovered that the mansion called *York-House*, and the lands thereto belonging, which were the principal part of the estates sold, were freehold, and particularly the conveyance thereof to the testator as such, by lease and

(1) See the observations upon this case of Lord *Eldon C. &c.* in *M. Townsend v. Stangroom*, 6 Ves. 338. *Ex parte Lacey*, 6 Ves. 629. *Mortlock v. Buller*, 10 Vesey, 305. 313, 314. *Ex parte Bennett*, *ibid.* 398, 399. *Smith v. Clarke*, 12 Ves. 482. See also *Downes v. Grazebrook*, 3 Merivale, 200. 209. and *Sugden, Vend. & Purch.* 19. 24. 186. 227. 253, 254. and the references (5th edition).

(2) See the observations referred to by the preceding note.

release

release of 15th and 16th July 1746, and that only a small part was copyhold held of the manor of *Sion*, upon which the defendant *Taggart* wrote to Mr. *Blake*, as attorney for Mr. *Twining*, desiring Mr. *Twining* would relinquish his purchase, on two grounds; 1st, that the defendants had been deceived by Mr. *Blake*, whom they considered as their agent, bidding for Mr. *Twining*. 2dly, that the estates had been sold under a mistake as to their tenure; and, upon Mr. *Twining* declining to relinquish the purchase, the defendant *Taggart* refused to execute conveyances of the premises: upon which the plaintiff filed the present bill for a specific performance.

The defendants *Taggart* and *Addison*, by their answers, swore, that at the time of the sale they believed that Mr. *Blake* was bidding for the vendors, and *Taggart* filed a cross-bill against *Twining* and *Blake*, stating the same thing, and praying that the biddings might be set aside as fraudulent and void against him; or, if the Court should be of opinion that the biddings were fairly made, by *Blake*, on behalf of *Twining*, that *Blake* might answer to [*] him (*Taggart*) for the difference between the sums of money at which the premises were knocked down to him at the sale, and their real value at the time, and an account, or issue, directed for that purpose.

Mr. *Twining*, by his answer to the cross-bill, stated his meeting with *Blake* as accidental, and that, *not chusing to bid himself, he desired him to bid for him, and that Blake actually did so, and that he knew nothing of Blake's acting as attorney for the vendors.* (3)

Mr. *Blake*, by his answer to the cross-bill, stated that he bid for Mr. *Twining*, and not as the agent of the vendors.

The defendants read evidence to prove that *Blake* was considered at the sale as the agent of the vendors; particularly *Thomas Southcombe*, who swore that he did not believe that the persons present considered the estates as sold, but that they had been bought in by the defendant *Blake* on behalf of the vendors, and that he attended as attorney for them; and *George Adney*, who swore to the same effect, and that he believed that the bidding of the defendant *Blake* was prejudicial to the sale, for that *Southcombe* had informed him he would have bid a larger sum, at the sale, if he had believed that the defendant *Blake* had bid for himself or any other person save the vendors. (4)

Mr. *Scott* and Mr. *Finch* (for the plaintiff, *Twining*) argued that, in this case, Mr. *Blake* was the only real bidder, the bidding for the vendors being illegal: *Berwell v. Christie*, Cowp. 395. a vendor cannot bid at the sale of his own goods, or order the auctioneer not to sell under a certain price. And the acts of parliament, exempting goods bought in for the vendors from the duty, have not made the practice legal, as they may apply to a method which is legal, as putting up the goods at a certain price. Here *Blake* was a fair bidder for *Twining*. Though he had been the agent of the vendors, he was not employed to bid for them. With respect to the value, the surveyors employed for the vendors swear that it was sold for its full value.

(3) Lord *Redesdale's* notes mention this part of the report not to be as above stated.

(4) Lord *Eldon C.* said, it would be a wholesome rule that the solicitor in a cause should have nothing to do with a sale, as the certain effect of a bidding by the solicitor in a cause is, that the sale is immediately chilled. *Vide Nelthorpe v. Pennyman*, 14 Ves. 517. So also in the case of assignees of a bankrupt who bought in an estate, ordered to be sold by the Court. *Sugden, Vend. & Purch.* 59, 60. and Appendix xi. p. 13. 5th edition. It were desirable that a rule had been laid down: for Lord *C. Baron Richards*, ordered, that persons who had bidden at the instance of a solicitor who conducted a sale, which had been directed by the Court, should, at their instance, be discharged from their purchases; although the above cases were cited, and the point strongly pressed on their authority. In *Noel v. Lord Henley*, 19 January 1819.

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MORRICK.

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Mr. Mansfield, Mr. Hardinge, and Mr. Mitford, (for the defendants). — The sale ought not to be carried into execution, having [*] passed under a mistake, all parties thinking it to be copyhold, and it turns out to be freehold. Wherever a man is drawn, by accident or mistake, into a bargain, this Court will stand neuter and leave the party to go to law. The only person who could form a judgment on the subject was *Blake*, who has made himself the agent for the buyer. It is impossible to say there is not a difference of value, though copyholds held of the manor of *Sion* are nearly, they cannot be wholly of the value of freehold; there is always a difference, as the lord would expect a sum of money to enfranchise. If it had been sold as freehold, and turned out to be copyhold, the contract could not be enforced (5): *Hick v. Phillips*, Pr. Ch. 575.; then it should be the same in this case. 2d. The contract should be set aside also on account of the situation of *Blake*, who from agent for the seller is become the agent of the buyer. It is the same as if he had bid for himself. Mr. *Twining* can be in no better situation than *Blake* himself would have been. If he, going to the sale as agent for the seller, had bid for himself, and had come to this Court for a performance of the contract, the Court would not decree it. The agent or trustee of the seller cannot become the buyer, *Whelpdale v. Cookson*, 1 Vesey, 9. (6) then every thing affecting him must affect Mr. *Twining*, and the sale, if not valid to *Blake*, will not be so as to him. *Blake* appeared at the sale as the agent of the vendor; every body present thought him so; *Taggart* looked upon him as his agent, and when he bid, conceived he bid for him. *Taggart* had no intention to sell to *Blake* or to *Twining*. Wherever a man has got an estate by misrepresentation, this Court refuses to give assistance, *Phillips and Duke of Bucks*, 1 Vern. 227. Then, 3dly, with respect to the relief prayed against *Blake*: it is true, there is no case where such a relief has been given against a solicitor; but in *Arnot v. Biscoe*, 1 Vesey, 95. the Court thought it had a jurisdiction for that purpose. And in *Dashwood v. Fendon*, in 1748, the cause stood over to enquire whether the parties stood in any other character than as agents. If a person, having notice of an incumbrance, sells to one having no notice, who sells to another, though this vendee has no remedy against his vendor, yet he has against the first seller, *Ferrars v. Cherry*, 2 Vern. 384.

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Mr. *Madocks* and Mr. *Stratford* (for *Blake*). — There was no fraud on the part of *Blake*, nor any corrupt motive to benefit [*] *Twining* in the purchase: his bidding for him was accidental; and he was at liberty so to do, not being employed to keep up the price. If the defendant has any remedy, it must be at law, this Court will not interfere in cases where an action will lie.

The defendants offering to read the evidence of *Addison* one of the defendants, Mr. *Scott* opposed it, on the ground that he was a defendant subject to payment of costs, and therefore incompetent.

Mr. *Mitford* argued, that this was not sufficient to render his evidence incompetent, and cited a case of *Downing v. Townshend* in 1753, [Ambler, 280. 592.] where Sir *George Downing* wrote a note and delivered it to Mrs. *Townshend*, by which he gave to Mrs. *Townshend* whatever monies she might have of his in her hands at the time of his decease, for the use of her daughter. On a bill filed claiming certain sums of money which Mrs. *Townshend* claimed to hold in trust for the daughter, it was a question, at the hearing, whether Mrs. *Townshend's* evidence should be

(5) See post. 4 vol. 497. and *Calcraft v. Roebuck*, 1 Ves. jun. 221. 226. *Drew v. Cory*, 9 Ves. 368. Et vide 13 Ves. 78. and Sugden, Vend. & Purch. 252, 253., and notes (5th edition).

(6) Vide Supplement to Vesey, sen. 8, 9, 10, 11, 12.

read,

read, as she was a defendant, and if her holding the money should be held fraudulent, would be liable to costs. Lord *Hardwicke* ordered the evidence to be read, though he said he saw the importance of the question to families, and that Courts would admit of such evidence with great caution; yet, as she had no direct interest, her evidence was competent.

But his Honor thought it was impossible to say the defendant, when examined, was not in a situation to be swayed. He was a trustee on whom *Twining* was calling for a specific performance of a contract, he therefore thought his evidence could not be read.

Master of the Rolls.—These are two bills, the first filed by Mr. *Twining* for a specific performance of the contract for the sale. The second by Mr. *Taggart* impeaching the sale, and praying that it may be set aside; or if not so, praying a remedy against Mr. *Blake*. The principal question, on the first bill, is with respect to the specific performance; and it is admitted, on all hands, that it is not every contract which is entered into that a court of equity will carry into execution. Several points have been made whether this is such a contract as should be [*] carried into execution: the first is with respect to value; but I think the evidence is not conclusive on that subject; it is not such as to assist the vendor, a great deal, as to the transaction. Neither do I think any blame is to be imputed to Mr. *Blake*. With respect to the intelligence communicated to *Skynner*, I think that would not afford a ground for successfully resisting the specific performance; the estate seems pretty nearly equal in value whether it be freehold or copyhold. Perhaps, in the converse, if represented as freehold and turning out copyhold, it might not hold; because the party buying might particularly wish for a freehold estate, but, on the vendor's side, it does not hold — *nil operatur*. The ground I shall go upon leaves the character of all parties unimpeached. The sale intended was a sale by auction, where every one who would might bid: if any thing therefore happened that would cast a damp upon the sale it must be hurtful to the vendor. *With respect to bidders being employed for the vendors, I do not say the doctrine in Bexwell v. Christie is wrong: but every body knows that such persons are constantly employed.* It is said, if those persons were known it would be inconvenient and detrimental, because it would deter fair bidders: *but if it was the idea of the persons present at this sale that Mr. Blake was such a bidder, it was detrimental to the vendor.* (7) Here he was known to be the agent of the vendor, he began early as a bidder, and, in fact, was the only real bidder. It is likely that he should be thought, by the persons present, to bid for the vendor, and, if I believe the witnesses, I must believe that it did chill the sale. Into this situation he was brought by the conference with Mr. *Twining*: the fair consequence is, that the sale did not proceed with so much advantage as it otherwise would have done. Mr. *Scott* said, if I thought the persons in the room thought him a puffer, it was thinking him what the law would not allow him to be; I cannot say I think so, as they knew the practice to be to employ such persons. *By an inadvertent act, Mr. Blake was in a situation which hurt the sale, and was put into that situation by Mr. Twining*: it is therefore not such a case that I can decree a specific performance. I will not set the contract aside, but will leave the plaintiff to his remedy at law. (7)

Both bills dismissed.

(7) *Vide* the references in note (1), *antea*.

1788.

TWINING
against
MORRICE.

[*331]

1788.

[*332]

Master of the
Rolls for Lord
Chancellor.

Lincoln's Inn
Hall.

Where a de-
fendant has
answered all
the circum-
stances respect-
ing his own
interest, he
shall not be
compelled to
answer the fur-
ther circum-
stances in the
bill.

[*] *NEWMAN against GODFREY and Others.*

(Reg. Lib. 1787. B. fol. 643.)

THE bill was filed by the plaintiffs, on behalf of themselves and other German merchants who used to employ *Benjamin Mee*, since become a bankrupt, as a factor *del credere* in selling linens and other goods to customers in *England*, at a certain rate of credit; and it stated, among other things, that the defendants, among whom was enumerated the defendant *Daniel Nantes*, formerly clerk to *Mee*, were, for a considerable time before the bankruptcy, creditors of *Mee*, and that the defendants, being desirous to obtain a security for their debts, had conversations and consultations together, at which it was agreed that they should get from the persons to whom *Mee* had sold goods belonging to the plaintiffs or the other German merchants, as much of the money as they possibly could, either in money or notes, and that they accordingly got from them several large sums of money, and acceptances for notes, and the bill went on to state the defendant to have obtained several sums from other debtors, for goods consigned from the German merchants. The defendant, by his answer, said that *Mee* was not, for a considerable or any length of time, before the month of *April* 1784, (the time of the bankruptcy) indebted to him in any sum of money whatsoever, except a small sum for his salary as his clerk, which, at the time of the bankruptcy, amounted to 9*l.* or thereabouts, and denied that he was desirous that his debt should be paid out of the money paid as factor to the plaintiffs, or that he had any consultations with *Mee* or the other defendants, respecting the manner in which *Mee* should discharge his debt, or that *Mee* indorsed any bill to him, or, by any means, let him have the benefit of the sums of money or bills charged in the plaintiff's bill; and the defendant disclaimed all interest in the sums of money, bills, &c. enquired after by the plaintiff's bill.

To this answer, the plaintiff took a great number of exceptions, on account of the defendant not having answered the subsequent parts of the bill. Upon arguing the exceptions before Master *Hett*, he overruled them, and reported the answer sufficient. Upon exceptions to the Master's report,

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[*] Mr. *Mansfield*, Mr. *Scott*, and Mr. *Hollist* argued that the defendant *Nantes* was not a mere witness, but a party against whom relief was to be obtained; he is charged as being a party in a fraudulent transaction, he may, therefore, be put to answer to the circumstances of the fraud; all he has done is to deny that he received any of the money, but this is not sufficient. Suppose we should be able to prove that he was a creditor, and was paid out of these funds, we should have a right to his answer to the further circumstances. He is charged, in the bill, as clerk. In that capacity he is liable to answer. Like the case of attorneys, who are liable to answer to the circumstances of things done in the course of business: as such, having put in an answer as a defendant, he should have answered the whole case, *Cookson v. Ellison*, (*ante*, 252.) Mr. *Milford* and Mr. *Steele* (for the defendant).—The judgment which the Master has formed, is right. *Nantes* was not bound to answer further, unless there is some special circumstance to compel him so to do. He was made a party merely as being a creditor. If he had been charged to have received the sums as book-keeper, it would have been very doubtful whether he could have been compelled to answer, as being similar to the case of an attorney. He has answered that he was
a cre-

a creditor only to the amount of 9*l*. and that, he has not received any of the bills or notes; further than that he stands merely in the light of a witness. If they could prove that he had received any money, he would, on this answer, be compelled to repay it, as having disclaimed being a creditor. The case of *Cookson v. Ellison* does not apply; there the party had answered part of the circumstances, he had stated a part of the conversation, and the exception taken was that he had not stated the whole.

His Honor, for a long time, doubted whether the defendant was not called upon in a further character than as a witness; but, at length said, that the defendant having sworn that he is not a creditor, nor had received any of the money, had done away all his interest, and reduced himself to the case of a mere witness. If they can prove him to have received any of the goods or money, he cannot hold them, having disclaimed all title to them. He can put himself in no worse situation than by such disclaimer. It is a principle that a mere witness shall [*] not be made a party to a bill. I was struck by the observation, that, by some parts of his answer, it might appear that he had further claims; but his answer is such that he can have no title. If such a person was to be made a party, I do not know where it would end; it would rake into every circumstance of a man's life, to prove him a bad man. I think the Master was right in disallowing the exception.

Exceptions to the Master's report over-ruled.

1788.

NEWMAN
against
GODFREY.

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COX against PEELE. [19 April.]

(Reg. Lib. 1787. A. fol. 688.)

An Appeal from the Rolls.

ON the 21st August 1777, one *Theed* mortgaged the premises, being two leasehold houses in *St. Mary-le-bone*, to the defendant, for securing 400*l*. and interest, and afterwards conveyed the equity of redemption to Sir *Lawrence Cox*. The defendant got possession, afterwards, by ejectment, and filed her bill for a foreclosure, on which she obtained a decree for an account at the Rolls, 25th May 1779. No further proceedings were had till 1783, when the attorneys for the plaintiff and defendant agreed, with respect to the final decree, that the estate should be sold, the mortgagee paid her principal and interest, and the remainder paid to Sir *Lawrence Cox*, but that the defendant should in the mean time take her decree. This agreement was not in writing. On 13th March 1784, the final decree of foreclosure was obtained, and the premises were soon after put up to sale by auction; but the sale was afterwards put off, and the premises were not sold, and Mrs. *Peele* insisted on her decree of foreclosure, and that the premises should not be put up to sale.

Upon this *Cox* filed the present bill, praying that the premises might be sold, the defendant paid her principal and interest, and the residue be paid to him according to the agreement between the attorneys, and, afterwards, becoming a bankrupt, his assignees filed a supplemental bill. The defendant, by her answer, denied any knowledge of the agreement. The cause came on to be heard the 29th January last, at the Rolls, when [*] *his Honor* dismissed the bill with costs, on the ground that the agreement was not in writing, and, therefore, void, under the statute of frauds. And the plaintiffs brought this appeal.

Mr. *Selwyn* and Mr. *King* (for the plaintiffs).— This is not a case within

Bill to carry in-
to execution on
a parol agree-
ment between
solicitors, that
there should be
a decree of
foreclosure;
that the estate
should be sold,
the mortgagee
paid her princi-
pal and interest,
and the remain-
der to the mort-
gagor, dis-
missed at the
Rolls, as within
the statute of
frauds: on ap-
peal, evidence
of the agree-
ment read *de
bene esse*, but
the decree
affirmed.

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1788.

Cox
against
Field

within the statute of frauds, the only member of that statute which could apply is, "Upon any contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them." Here the agreement was not concerning any interest in lands, it was only an agreement between the solicitors, with respect to the order of the court. Suppose the estate had been subject to a judgment, and the agreement had been, that the judgment should be paid, that would not be an agreement respecting an interest in lands; an agreement as to when the cause should be heard could not be within the statute. — This was merely an agreement to make the act of court conditional, and that an absolute decree should be applied to a particular purpose. Mrs. *Peele* was herself active in the agreement. It is fraudulent in her now to insist on her decree. In fact, the agreement is in part executed; for all the proceedings subsequent to the decree, are in consequence of the agreement.

The plaintiffs proposing to read the evidence of their solicitor as to the agreement, which had not been read at the hearing, the bill having been dismissed upon opening it, Lord *Chancellor* said, that, properly, no evidence can be read here that was not read below, and if evidence, which ought to have been read there, was rejected, that ought to be the *gravamen* of the appeal. But seeming inclined to hear the evidence read, Mr. *Scott* then opposed it on the ground of being parol evidence of an agreement, which, to be binding, ought to have been in writing. The introducing parol evidence, he insisted, was in the very teeth of the statute, which is that no evidence shall be admitted of an agreement unless it is in writing, and signed by the party or a person authorised by him: even had this been in writing, it was beyond the solicitor's authority to make such an agreement. He was employed to foreclose the equity of redemption, and he makes an agreement which would render the decree nugatory. The defendant in her answer swears it was without her consent.

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Lord *Chancellor*. If it is to be maintained at all, it must be as an agreement relative to a decree. The whole was under the [*] management of the solicitors, who were competent to make agreements relative to the order of court. If they suffered an earlier foreclosure than is usual by the form of the court, or opened the decree otherwise than by consent, such an agreement would not be binding. But I cannot see how the plaintiff can introduce, by parol evidence, an interest paramount the decree, the equity would have been to open the foreclosure. If any body has obtained a decree of foreclosure on terms which have not been complied with, the application should have been to open the foreclosure, where such evidence might be introduced. I will take the evidence *de bene esse*. I think it will be better to contest its application than its validity.

The evidence being read, and being imperfect, Lord *Chancellor* said, he thought the bill would not do. The evidence is by no means sufficient to overturn the decree.

Decree affirmed.

An application had been made by motion to *his Honor* to open the foreclosure, but it was refused.

1788.

*Master of the
Rolls for Lord
Chancellor,
Lincoln's Inn
Hall.*

[8. C. 2 Dick.
702.]

Plea, to a bill
for an account
of a partner-
ship, that all
matters in con-
troversy were
to be deter-
mined by
arbitrators,
allowed. (1)

HALFHIDE *against* FENNING. (1)

(Reg. Lib. 1787. A. fol. 367.)

THE bill stated, that the plaintiff and defendant were co-partners in trade as calico-printers, and prayed a discovery of monies paid, and other partnership transactions, and relief. To this bill, the defendant pleaded that, by the articles of co-partnership (2), all differences which might arise were to be referred to arbitration, and that the matters in dispute had not been so referred. (3)

Mr. Scott and Mr. Fontblanque (for the plaintiff). — This is a plea to the discovery and relief, in which respect it is a bad plea, for although it might be a good plea to the relief, it is not so to the discovery (4); for, without that, the plaintiff cannot bring the facts before the arbitrator. The plaintiff has a right to a discovery of any fraudulent transactions of his partner. It is true no fraud is charged in the bill, but it charges facts from which fraud must be induced, and, where that is the case, it is not necessary to charge it. If the justice of the [*] case cannot be attained before the arbitrator, the jurisdiction of this court is not ousted. In *Wellington v. Mackintosh*, 2 Atk. 569. Lord Hardwicke over-ruled such a plea, on the ground that the arbitrator could not examine the party upon oath.

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Master of the Rolls. (5) — This is a bill against the surviving partners, and the representatives of deceased partners, praying discovery and relief. To this the defendants have pleaded that, by the articles, if any controversy should arise between the partners they should be referred to arbitration; and that there should not be any suit at law, or in equity. There can be no doubt, but that parties entering into an agreement that

(1) This case is universally held to be against the law and practice of our courts. It has always been held "a singular case, and in direct opposition to Lord Hardwicke's decision in *Wellington v. Mackintosh*, 2 Atk. 569.; besides that it has since been repeatedly over-ruled." *Vide Mitchell v. Harris*, 2 Ves. jun. 129. 136. *et postea*, 4 vol. 311. 316. *Satterley v. Robinson*, cited in note, *ibid.* *Street v. Rigby*, 6 Ves. 815. *Vide* pages 817, 818, 819, 820, 821, *per* Lord Eldon C. and in *Waters v. Taylor*, 15 Ves. 18.

There were, however, in the principal case, negative words, that no suit, either at law or in equity should be commenced until an award should have been made; as to which, see 6 Ves. 821. That there may be cases in which, where there is such a clause, a court of equity will not interpose until the prescribed step is taken, is manifest by Lord Eldon C.'s decision of *Waters v. Taylor*, last referred to, 15 Ves. 10, &c. It seems clear, that such a covenant to refer cannot be pleaded in bar to an action at law (*Thompson v. Charnock*, 8 T. R. 159. and the above references, *passim*); and that a court of equity will not decree a specific performance of one, *Price v. Williams*, 6 Ves. 818. *Et vide* Mr. Beames' *Elem. Pleas*, 231, 232.

(2) The plea stated a clause in the co-partnership articles, that if any of the parties should commence or prosecute any bill in equity, to be relieved against the payment of any sum to be awarded due, such clause of reference to arbitration might be pleaded in bar to the same; and that no suit, either at law or in equity, should be commenced, &c. until after such arbitrament should be made. And the defendants said they had always been ready and willing, and thereby offered to submit all questions, &c.

(3) The plea did not state expressly that the matters in dispute had not been referred, as above stated, or more than in the preceding note.

(4) Lord Eldon C. reprehends Mr. Brown's report of his argument as here stated; and says, he should not have been surprised with the decision, if his client's case had been so argued. *Vide* 6 Ves. 820.

(5) See the observations of Lord Eldon C. upon this decision, as referred to by note (1), *antea*. Lord Eldon states, that Lord Kenyon himself afterwards thought it wrong. 15 Ves. 18.

all

1788.

HALFWIDE
against
FENNING.

all disputes (6) shall be referred to arbitration, are bound by such agreement. The legislature has countenanced such agreements by the act of William 3. for facilitating the execution of them. The court of *King's Bench* has considered the agreement that no bill in equity should be brought, as a legal part of the contract, and has accordingly granted attachments against parties filing such bills. (7) Such references are very advantageous to the parties; as arbitrators are more competent to the settling of complicated accounts than the officers of courts of law or equity. If the matters in controversy were not within the range of such a reference, that objection would be fatal: but the opinion attributed to Lord *Hardwicke* only was that the arbitrators should have had a power to examine on oath; with respect to that point Lord *Hardwicke's* opinion must be misreported, as the parties could not give the arbitrators such a power. (8) If this case had been referred to arbitrators, and they had found the examination of the parties insufficient, they would have declined to determine, and, by their so declining, the jurisdiction of this court would be restored. That is an answer to the objection that the plea should not go to the discovery. If it became necessary for the information of the arbitrators, that there should be a discovery (9), the bill ought to state that fact; but I ought to see that the arbitrators could not proceed before I entertain jurisdiction of the matter: I am satisfied, at present, that the first appeal should have been to those judges pointed out by the articles. If they cannot determine the controversy, they will remit it to this court. Plea allowed.

(6) Lord *Redesdale's* notes make the following suggestion: "Suppose the parties do not agree as to what is in dispute?"

(7) But see 6 Ves. 820. per Lord *Eldon* C.

(8) "Whatever reasons are assigned for Lord *Hardwicke's* determination, the plea was manifestly over-ruled, which stands in direct opposition to the case in *Brown*." Per Lord *Loughborough* C. in *Mitchell v. Harris*, 2 Ves. jun. 136.

(9) Vide 6 Ves. 818, 819, &c.

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Master of the
Rolls for Lord
Chancellor.

Lincoln's Inn
Hall.

[30th April.]

One part-owner
of a ship cannot
bring a bill, on
behalf of him-
self and the

other part-owners: but they must all be parties. (1) Money paid to part-owners for their votes in the appointment of a captain, no profit of the ship.

[*] MOFFATT against FARQUHARSON. (1)

(No Entry.)

THIS was a bill filed by the plaintiff, on behalf of himself and the other part-owners of a ship, for an account of profits of the ship, particularly

(1) The decision here is clearly wrong, (although certainly supported by some former authorities, as *Leigh v. Thomas*, 2 Ves. 312.) and has been over-ruled repeatedly. Vide *Cullen v. D. Queensbury*, ante, 1 vol. 101. and the Editor's notes and references; especially *Lloyd v. Loaring*, 6 Ves. 773. 779. *Adair v. New River Company*, 11 Ves. 429. *Anon.* Prec. Ch. 592. and *Good v. Blewitt*, 13 Ves. 397. which was precisely the case of a bill against the owners of a privateer for an account of captures. Vide etiam *Brown v. Harris*, 13 Ves. 552. *Cockburn v. Thompson*, 16 Ves. 321. 328, 329. and *Buckley v. Cator*, decided by Lord *Thurlow* C. referred to 16 Ves. 329. and stated and acted upon by Lord *Eldon* C. in *Pearce v. Piper*, 17 Ves. 11. 15, 16.

The Editor has a copy of a note of the principal case, taken by Sir *Samuel Romilly*. It is as follows: — "Bill by plaintiff on behalf of himself, and all other the owners and proprietors of a ship in the *East-India* service, called the *Resolution*, for an account of the sale of the office of master of the said ship. Demurrer for want of equity."

Master of the Rolls (sitting for the Lord Chancellor.) — "Why has not the defendant demurred for want of parties? In such a bill, all the part-owners of the ship must

larly for money paid to the defendants for their vote in the appointment of a captain.

The defendants demurred to the whole bill, and in support of the demurrer made two objections. 1. That all the part-owners should have been parties. 2. That the money received, for their votes, was not a profit of the ship.

His Honor said the first objection was decisive. This not like the case of part of the parishioners filing a bill for themselves and the other parishioners, to establish a modus, but all the part-owners should have been parties. (1)

It is not illegal for an owner of a ship to sell his vote in the election of the captain. The money so received can never be a profit of the ship. I am of opinion the plaintiff has no equity. Demurrer allowed.

" be before the Court. I remember a case in this Court, where a bill was filed respecting a benefit society; and it was held, that every individual member of the club should be before the Court." [Every individual member in the case of the past overseers, *Fells, Read*, 3 Ves. jun. 70. was before the Court.]

" Mr. Scott said he would demur *ore tenus* for want of parties: but the demurrer for want of equity was allowed, 30th April 1788."

1788.

MOFFATT
against
FARQUHARSON.

DUKE of LEEDS against the Corporation of NEW RADNOR.

(Reg. Lib. 1787. A. fol. 440.)

Rolls, 8th May.

[*Vide* 8. C. on
appeal, *post*.
518.]

THE bill stated that Queen *Elizabeth*, by letters patent dated 20th July 1562, granted to the corporation of the town and borough of *New Radnor* certain lands, messuages, tenements, and hereditaments, and also certain tolls of fairs, markets heriots, and other services and revenues, and various other privileges, reserving to herself thereout, in consideration of such grant, to her and her successors kings and queens of *England* the payment of an annual sum of 37*l.* 8*s.* 1*½d.* That King *Charles the Second*, by letters patent dated 8th July 1674, gave to *Thomas Earl of Danby*, afterwards Duke of *Leeds*, (amongst other things) all that annual or fee-farm [*] rent of 37*l.* 8*s.* 1*½d.* issuing out, or payable for, the town of *New Radnor*, to hold the same to the said *Thomas Earl of Danby*, his heirs and assigns for ever. That the said *Earl of Danby*, from the time of granting the letters patent, received the rent at *Michaelmas* yearly, by the bailiff or town clerk of the borough, for the time being, and after his death, the bailiff, &c. paid the rent to the several persons deriving title to the same under the said *Earl*, that the said *Earl's* estate and interest in the fee-farm rent was become vested in the plaintiff, as his heir, and that the plaintiff's guardian and trustees had, during the plaintiff's minority, received it from the bailiff or town-clerk of the town of *New Radnor*, and that such payment had been continued regularly, during the plaintiff's minority, and until *Michaelmas* 1765; that the sum of 90*l.* had been paid to the plaintiff's agent in *November* 1778, upon account, but

Bill, for a fee-farm rent, retained for a year, and plaintiff to try his title at law. (1)

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(1) *Vide Bouverie v. Prentice*, *antea*, 1 vol. 200. and the Editor's notes. The case of the Duke of *Leeds v. Powell*, 1 Ves. 171. and Supplement, 98. (*quod vide*) was a proper case for relief, because the rent there was an entire one, and there were no dememe lands to distrain upon. In the principal case, although the rent was an entire one, the plaintiff had, *ex concessu*, a remedy at law; his bill therefore ought to have been dismissed: so that his Honor's retaining the bill was wrong at all events, as the defendant's admission of his title was held to give the Court a jurisdiction which it would not have otherwise taken, the course adopted of retaining the bill for 12 months, was giving the plaintiff too scanty a measure of justice. Without that admission, the Court would have given him too much. See per Lord Chancellor on the appeal, *postea*, 519.

that

1788.

The Duke of
LEEDS
against
NEW RADNOR.

that there had accrued and was due to the plaintiff, for arrears, the sum of 748*l.* 2*s.* 11*d.* that the plaintiff could not distrain for the arrears on the lands out of which the rent was issuing, they having undergone various alterations in the boundaries and descriptions, and having been let out to different people, and that a great part of the revenues of the corporation arose from the tolls of fairs and markets and other incorporeal matters, by reason of which circumstance the plaintiff was deprived of his remedy at law. (2) The bill therefore prayed that the defendants might account with the plaintiff for the arrears of rent, and that the plaintiff might be declared to be entitled thereto, and to the arrears thereof remaining unpaid, and that the defendants might keep down and pay the plaintiff the rents in future, and that the rent, services, toll, and other revenues of the corporation might be charged with, and subject to, the payment of the said arrears, and the rent which should grow due in future.

The corporation, by their answer, *admitted the plaintiff's title to the rent and the arrears accrued due* (3); but they denied that the lands, out of which the rent issued, had undergone any alteration in the boundaries and descriptions, and alleged that the estate of which the corporation was seised or intitled to under the letters patent was not able to pay the rent to the plaintiff, and that for that reason the rent had not been paid; and insisted that the plaintiff's remedy was at law.

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[*] The cases cited, were, *Middlemore v. Daughy*, before Lord Bathurst, 1 Vern. 359. 1 Cha. Ca. 121. 2 Vern. 382. 386. Pre. Cha. 122. *Duke of Leeds v. Powell*, 1 Vesey, 171. (4)

Master of the Rolls.—The use of cases is to establish principles; if the cases decide different from the principles, I must follow the principles, not the decisions. The proposition to be maintained is that wherever a rent, of any kind, is due, a court of equity has a right to interfere; but this principle is not true, unless the demand is against assets; because the plaintiff has a remedy at law, by either action of debt, or by case for use and occupation, or by distress; nor will a court of equity interfere because one remedy fails; as if the tenant goes off, though the distress is gone the party has other remedies at law. Then what is the demand here? It is for rent, the quantity of which is ascertained. It is one rent, not aliquot parts, and which is payable out of a certain portion of property. Has the plaintiff a remedy at law? He certainly has (5); for an action of debt will lie (5): but it is argued that the legal remedy is not so fruitful as the equitable, that the property is not so accessible by legal execution as by equitable sequestration. But the plaintiff may have an elegit; and it is no reason for coming here that you can have it only for a moiety of the land. It would be confounding the boundaries of jurisdiction for equity to interfere, and, if after taking your legal remedy it does not give satisfaction, if it is necessary you may proceed in equity, if a court of equity can aid you. (5) I am not satisfied with the opinion

in

(2) The plaintiff charged that the rent payable to him was *one entire and undivided clear rent-charge* issuing out of the town or borough, and the messuages, lands, &c. granted by Queen Elizabeth to the corporation; and was constantly paid by the bailiff, aldermen, &c. to the crown, before the original grant thereof, &c., and to the grantees of the crown, &c., and to him and his ancestors, as such, afterwards, &c. Reg. Lib.

(3) See note (1), *antea*.

(4) See the circumstances of that case fully, and the decree, Supplement to *Ferry*, sen. 98, &c.

(5) *Vide* note (1), *antea*. On the appeal, Lord Thurlow is reported to have said, "In this case the decree is not tenable, because the defendants have by their answer admitted the plaintiff's right; and the Court, by retaining the bill for a year, has admitted that the relief lies in equity. To send it to law, only to try whether there is a remedy

there

in *Daughy v. Middlemore*. I will retain the bill for a year, to let the plaintiff proceed at law. (5)

"there would not be that measure of justice which the court ought to give; therefore the account must proceed." Decree at the Rolls reversed; and decree for an account pronounced with costs against all the defendants. *Vide postea*, 519.

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The Duke of
LEEDS
against
NEW RADNOR.

[*] TRINITY TERM.

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28 Geo. 3. 1788.

ERRINGTON against AYNESLY.

(Reg. Lib. 1787. A. fol. 469.)

Master of the
Rolls for Lord
Chancellor.

[S. C. 2 Dick.
692. *Quod vide.*]

THE plaintiff entered into a contract with the justices of the peace of the county of *Northumberland*, in quarter-sessions assembled, (of which session the defendant was chairman,) to build a bridge over the river *Tyne*, and to support the same for seven years, (after which it was to become a county bridge,) in consideration of 6000*l.* and materials to the value of 3000*l.* which had been left by former undertakers, who had failed in their undertaking. The money was paid to him, and the materials delivered, and he entered into a bond in the sum of 9000*l.* to perform the articles. The bridge was built in 1781, and certified for: but, in the year 1782, it was thrown down by a violent flood. The plaintiff not rebuilding the bridge, (being advised by Mr. *Smeaton* that no bridge could be built on the scite, that would stand,) the defendant brought an action on the bond; upon which the plaintiff filed the present bill, praying (2) an injunction against the defendant's proceeding on the bond, and that an issue *quantum damnificatus* might be directed. An injunction was directed for want of an answer, which was dissolved upon the answer coming in, but was afterwards continued, on the merits, till the hearing.

A bond for performance of covenants to build a bridge, and the sum agreed for actually paid, an injunction granted to restrain an action on the bond, and an issue *quantum damnificatus* ordered, the sum mentioned in the bond being a penalty. (1)

The cause came on before his Honor the Master of the Rolls, on the 22d February last.

Mr. *Scott* and Mr. *King* (for the plaintiff). — This is not a bond given for a penal sum, but to secure the enjoyment of a collateral object, by the performance of articles. The defendant has therefore only a right to an issue *quantum damnificatus*, not to an [*] action for the penalty of the bond. The only question is what damage the county have sustained by not having a bridge. Suppose a bridge had been built, but not within the time contracted for, the only claim of the defendants would be for the damage suffered by not having the bridge within the time. This doctrine was laid down in the case of *Sloman v. Walter*, (*ante*, vol. 1. p. 418.) and in *Hardy v. Martin* there cited, where the action was upon

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(1) See *per M. R.* in *Eaton v. Lyon*, 3 Ves. 692, &c.

(2) *Et vide Sanders v. Pope*, 12 Ves. 282, &c. &c., and *Sloman v. Walter*, *ante*, 1 vol. 418.: "That the plaintiff might be relieved from the bond and articles of agreement upon such terms and in such manner as the court should be pleased to direct, and for a reference to the Master, or that an issue might be directed to try, or that it might be otherwise settled to inquire what compensation and satisfaction (if any) under the circumstances the plaintiff ought to make to the defendant, touching the matters in question. And in the meantime for an injunction." Reg. Lib.

a bond,

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a bond, in a penalty of 600*l.* an issue was directed, and the jury gave 1*s.* damages. In this case the contract was to do an act, which at the time appeared possible, but which it turned out would be merely nugatory, for if another bridge were erected, it could not be supported, and in seven years' time the defendants would bring themselves into the same situation of being compellable to do an impossible thing. A bond to do a thing that is impossible, is in itself void. The bill therefore prays no more than the Court will do, that is, relieve against the bond, and give a satisfaction to the defendants in damages, which is all the justice the Court can administer.

Mr. Attorney General, Mr. Madocks, and Mr. Ridley (for the defendants). — If Mr. Errington had not contracted with the county, they would have contracted with Mr. Smeaton, in the first instance, for a bridge, which would stand seven years, and Mr. Smeaton must have supplied them with such a bridge; are the county to be in a worse situation in treating with Mr. Errington, than if they had treated with Mr. Smeaton? If a man covenants for his own skill, or for the skill of another, he cannot say it turns out differently, he must perform the contract or pay the penalty. This is not a penalty of double the sum, but the very sum contracted for, it is therefore either stated damages, or a sum contracted for to secure the act being done. And the evidence on our side, Mr. Mylne, says a bridge may be erected on the scite that will stand the seven years. It is like a valued policy on a ship; the sum in the policy must be taken as the value. On this case, upon filing a bill, we could have compelled him to do the very act unless it was impossible; but it is said, the bond being for the performance of covenants, there must be an issue. But there is no possibility of a satisfaction in this case, but by building a bridge which will stand seven years. The Court will never relieve against a penalty of this kind, but on the terms [*] of performing the contract specifically, especially in a contract formed like this, where there is no over-reaching, nor any thing unfair, and the parties acted with their eyes open: the plaintiff must therefore build the bridge or re-pay the money.

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His Honor, in the course of the cause, and in breaking the case, said, did you ever know a bill for a specific performance of a contract of this sort? I remember an agreement to prevent the bed of a river from breaking its bounds. It was in the case of Lord Kilmorey v. Thackerray. (3) The Court of Exchequer thought they could not decree a specific performance in general cases, but, that permitting the river to break its bounds was permission of waste. There is no case of a specific performance decreed of an agreement to build an house (4), because if A. will not do it B. may. A specific performance is only decreed where the party wants the thing *in specie*, and cannot have it any other way. (5) Although the sums paid here may regulate the damages, the sum contained in the bond continues still a penalty. How it can be stipulated damages, I confess I cannot see. Suppose the damage should only be

(3) Mentioned in *Earl Bathurst v. Burden*, *antea*, 65.; and see the notes, *ibid.* 64, 65. and 2 Dick. 692. called *Shackerley v. Lord Kilmainy*.

(4) But see *contra Allen v. Harding*, 2 Eq. Ca. Ab. 17. pl. 6. In the *City of London v. Nash*, (3 Atk. 512. and 1 Ves. 12. Supplement, 14.) Lord Hardwicke C. directed an issue *quantum damificat*, instead of decreeing special performance. Lord Thurlow C. disapproved of the courts having interfered at all in those cases. See in *Lucas v. Comerford*, *postea*, 5 vol. 166. and 1 Ves. jun. 235. It seems, however, that every specific performance would be now decreed of such covenants, where adequate satisfaction in damages cannot be obtained at law, and where the agreement is sufficiently certain and distinct. See *Moseley v. Virgin*, 3 Ves. 184. *Et vide* in *Hink v. Brandon*, *arguendo*, and *per M. R.* 8 Ves. 161, 162, 163.

(5) See the latter part of the preceding note; and Sir W. Grant M. R.'s reference to this sentence. 8 Ves. 163.

100l. could they take the penalty of the bond? The first thing which struck me was that this was a penalty, and that the plaintiff had a right to have an issue to try what damage was sustained (6): but, that being contested, the cause must stand over.

The cause stood for judgment, and coming on again now in term,

His Honor said, that, upon examining the authorities, he could not distinguish this from the other cases of penalties (6), it must therefore go to an issue; which his Honor ordered to be tried at *Carlisle* as preferable for that purpose to *Newcastle*.

(6) *Vide Stoman v. Walter, antea*, 1 vol. 418.

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[*] ROBINSON *against* HARDCASTLE.

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Vide antea, p. 22.

(Reg. Lib. 1787. B. fol. 780.)

[*Vide* S. C.
antea, 22.]

THE question referred to the Court of King's Bench, upon this case, was, "whether the plaintiff took any, and what interest under the indentures of lease and release and settlement of the 13th and 14th of July 1713; and the will of *James Dunn* her father, in that part of the estate at *Great Chilton*, comprised in the said settlement, which lies on the east side of the post-road leading from *Rushy Ford* to *Ferry-Hill*."

It was twice argued, and the arguments of the counsel are fully reported, 2 Durnford and East, p. 244. *et seq.* The certificate sent by the Judges to the Lord Chancellor was as follows: "Having heard counsel on the case above referred to us, we are of opinion that the plaintiff *Elizabeth Robinson* is not entitled to any estate or interest under the indentures of lease and release and settlement of the 13th and 14th of July 1713; or the will of *James Dunn* her father, in the part of the estate at *Great Chilton*, comprised in the said settlement, which lies on the east side of the post-road, leading from *Rushy Ford* to *Ferry-Hill*."

W. H. Ashhurst.

F. Buller.

N. Grose.

[*Vide* 2 T. R. 241.]

The cause now came on upon the equity reserved.

Mr. *Mansfield*, and Mr. *Mitford* (for the plaintiff.) — This bill was filed, claiming part of the *Chilton* estate, under the will of *James Dunn*, who, presuming that he had authority, under the power, to dispose in favour not of children alone, but of grand-children, has made such a disposition. But, the Court of King's Bench being of opinion that the power did not extend so far, his execution of the power fails, for want of authority in himself to make the disposition, and the Court being also of opinion that the devise to the son and grandson, being void would not support the devise over to Mrs. *Robinson*, in consequence the [*] estate went, under the limitations in the deed, to *James Dunn*, his son, in tail. The only remaining question in the cause, is that of election. The father gave to his son *James* some freehold estate, though what does not appear; he also gave up to him, in his life-time; the leasehold estate, and made him sole executor of his will, and gave him the whole of his personal estate, which he has possessed. Having taken the personal estate under the will, and now taking the *Chilton* estate for want of a due execution of the power, he certainly ought to make a satisfaction to

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the plaintiff out of the personal estate, for having disappointed the devise to her of the *Chilton* estate.

On enquiry it appeared the personal property taken under the will was but trifling.

Lord Chancellor. — If the amount made it worth arguing, I am against you on this point; I do not think this case is within the rule. The reason is, that I take this to be an appointment that is disappointed. It is a good appointment with respect to the annuities, and, being an appointment to one purpose, I cannot construe it a disappointed devise as to another. It is not the case where, one person devising to *A.* and *B.*, and *B.* defeating the devise to *A.* is obliged to make satisfaction.

[See also a full report of the judgment of Mr. Justice Buller, 2 Cox, 28, &c. *Et vide* S. C. on the re-hearing, 1 Ves. jun. 22. and 2 Cox, 32, &c. Decree affirmed in Dom. Proc. 6 Bro. P. C. 427. 8vo. edit.]

Conveyance by a woman, before marriage, of her own property to trustees for her own separate use, not void as against the husband, unless there has been concealment, misrepresentation, &c. so as to amount to positive fraud. (1)

In this case, there was also a stratagem on the part of the husband, which would have deprived him of relief or right to complain in a stronger case. A deed of revocation of that settlement obtained by the husband under duress, was also set aside. (2)

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Countess of STRATHMORE against Bowes,

Et e contra.

THESE were two bills, the one filed by the Countess of *Strathmore* against *Andrew Robinson Bowes*, Esq; her second husband; the other by Mr. *Bowes* against the Countess and several other persons.

By the former, the Countess stated, that, upon the death of the late Earl of *Strathmore* her husband, in 1776, she became entitled, under the will of her late father, to divers castles, lands, &c. for life; that, in 1777, she being then about to intermarry with — *Grey*, Esq; she, with his consent, and for the purpose of providing for her children, by indentures dated 9th and [*] 10th of *January*, conveyed her estates to trustees, in trust to pay the rents and profits during her life, to such uses as she, whether sole or covert, should appoint; and made an assignment of her personal estate to the same uses. That afterwards, she intermarried with the defendant *Bowes* (in fact on the 17th of the same month). That afterwards, *Bowes*, by force, compelled her to execute a deed, revoking the uses of the deeds of 9th and 10th of *January* 1777: the bill therefore prayed that the deeds of 9th and 10th of *January* 1777 might be established, and the deed of revocation delivered up to be cancelled, that *Bowes* might be dispossessed of the estates, and he and his agents restrained by injunction from receiving the rents of her estates.

Bowes, by his answer to this bill, swore that he had no notice of the settlement of the 9th and 10th of *January* 1777 before his marriage.

By the cross-bill, he prayed that the settlement of 9th and 10th of *January* 1777, might be set aside, as fraudulent, being executed by the Countess, before marriage, without his knowledge, and in derogation of his marital rights, and that the deed of revocation might be established.

The cause came on in *Hilary* term 1788.

Mr. *Mansfield*, for Lady *Strathmore*, stated the first bill, and was going on to argue upon it, but Lord Chancellor said, It was a question of fact, whether the revocation was obtained by duress, which might be tried in an ejectment, or upon an issue. That, if the former deed could be set aside upon the ground of fraud on *Bowes*, the second deed will

(1) See the judgment on the present occasion reported also 1 Cox. 28. &c.; as to the re-hearing, *Vide ibid.* 32. &c. 1 Ves. jun. 22. *et postea*, note (5). See the case also in Dom. Proc. 6 Bro. P. C. 427. octavo edition. See also the note in *Peel's case*, 16 Ves. 158. Upon the principal case see also per Lord *Loughborough*, C. 2 Ves. jun. 194.

(2) See *Peel v.* — 16 Ves. 157.

be immaterial: he therefore directed the counsel for Mr. *Bowes* to go on upon the second bill.

Mr. *Attorney-General*, Mr. *Partridge*, and Mr. *Richards*, for Mr. *Bowes*, made two points; 1st, that the deed of 9th and 10th of January 1777, was fraudulent, being without notice to *Bowes*, and as such ought to be set aside.

2dly, That Lady *Strathmore* had no claim to a provision upon the setting the deed aside.

[*] As to the first point; the case must be considered as it stood at the time of the marriage, or immediately afterwards. The court can take no notice of any thing that has passed since. At that time the deed was fraudulent. It is admitted, by Lady *Strathmore's* answer, that it was unknown to *Bowes*; there is no pretence that he knew of it; as such it was a fraud upon him. This court will not hold any act valid that is done by either man or woman, in disparagement of the rights to be acquired by the other, by marriage. The husband is a purchaser of many rights by the marriage, and a purchaser of the highest kind the law knows. It will, therefore not permit a woman, by an act done before marriage without his knowledge, to defeat him of those rights. If therefore the deed was executed with this view, it is fraudulent. But Lady *Strathmore* contends in her answer, that it is not fraudulent; because it was not with a view to the marriage with *Bowes*, but to a marriage with *Grey*. But it will be difficult to argue that if it was fraudulent against *A.* it would not be so against any other husband. If it was with a general view to any marriage, it would be fraudulent against any future husband; if with a view to a particular marriage, yet if it defeated any other husband it would be fraudulent against him. The question is whether a widow can be permitted to make such a disposition. And although made with the knowledge of *Grey*, and, therefore, had the marriage with him taken place, he could not have complained; yet being made previous to another marriage, and concealed from the husband, it will be fraudulent against him. Every suppressed deed ought to be set aside. The question is a general one, whether a widow can be permitted to make such a conveyance defeating the marital rights of a second husband. One of the rights a husband acquires by the marriage is to take the profits of estates of which she is in possession. Here she is apparently in possession of large estates; and he cannot, by a private conveyance, deprive him of his rights. He married her as, *bond fide*, in possession of those estates. A deed executed for such purposes entitles a husband to the relief afforded by a writ of equity. There are several cases which shew this to be the law of the court. In *Carleton v. the Earl of Dorset*, Eq. Ca. Abr. 59. and Vern. 17. a conveyance made by the wife, before her marriage, to trustees to permit her to receive the rents and profits, and act as she might sole or covert should appoint, the lady, being crazed in her understanding, and endeavouring [*] to run away from her husband, the conveyance, being without the husband's knowledge, was set aside, and a case was there cited of *Edmonds v. Donnington*, which is in point to the present case. There a woman, on agreement, before marriage, with her husband to have a power to act as a feme sole, the husband dying, and she marrying again, the second husband, not being privy to the settlement, it was held that he was not bound by it. So in *Tudor Samyne*, 2 Vern. 270. the second husband's mortgage of a term settled by the former husband to the separate use of the wife, was held void. There is one case, indeed, in which such a settlement will be fraudulent and shall bind the second husband, that is where it is to make provision for the children by the former. This was determined in *Ant v. Mathews*, 1 Vern. 408. In *Poulson v. Wellington*, 2 Wms. 533.

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the Lord Chancellor said, If the second husband had had no notice of the first deed it would have been void. In *King v. Cotton*, 2 Wms. 674, Lord Chancellor dismissed the bill, but he said, upon the former hearing of the cause, that such a settlement by a woman before marriage seems fraudulent. It was the circumstance of its being for the children that made it valid against the second husband. In the present case, though it is suggested in the bill that it was for the purpose of providing for the children, there is no such provision in the deed. It is only for such purposes as she, whether sole or covert, shall appoint. According to the cases, the principle is established that a widow cannot, for general purposes, make such a conveyance, to defeat the right of her second husband.

2dly. The next question is, Whether, upon the setting aside this conveyance, she is entitled to have a provision made for her. Where a wife, not guilty of any fraud, has a property which the husband cannot get at without coming here, the court will oblige him to make a provision for her, but not where she is guilty of fraud. Under these cases, Mr. Bowes has a right to call upon a court of equity to set aside the deeds, and put him into possession of his rights as a husband. Lady Strathmore made this settlement, and, within a week after, married him without notice: this is a fraud; and, being so, is absolutely void. The fraud operates to invalidate the instrument, and makes it as if it had never existed. In that case, Mr. Bowes must be put in the same state as if she had never executed the deed. She cannot put herself in a better situation [*] than she was in; and as, in case the deed had never been executed, she could have no claim to a settlement, therefore she has no claim in the present state of the case.

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Upon the cause coming on again, an issue was directed on the question, whether the deeds of revocation were executed by the Countess under the duress of her husband? Which being found by the jury in the affirmative, the cause came on upon the equity reserved, before Mr. Justice Buller, sitting for the Lord Chancellor. The reporter did not hear the further argument, but understands it was little more than a repetition of the former; but he has been sufficiently fortunate to obtain the following note of Mr. Justice Buller's judgment.

Buller, J. (3) — Two bills have been filed; one by Lady Strathmore to establish the deeds of 10th and 11th January 1777, the other a cross-bill by Bowes, to have those deeds cancelled.

After the issue, the decree on the first bill is, of course, to have the deeds established.

The question arises on the second bill. I agree with Mr. Partridge that the deed of revocation is to be laid out of the case. The plaintiff is not thereby estopped from disputing the validity of the original deed.

I agree with him also, that Mr. Bowes cannot be considered as standing in the place of Grey, or as bound by what he would have been bound by; for there is no proof that Bowes knew what Grey was bound by. I shall first consider the dry question of law, and the authorities; and then the particular circumstances of this case. The circumstances are such as probably never happened before, and may never happen again. 1st. The dry question of law. The cases have been fully stated by the counsel. They may be divided into two classes. 1st. Relating to women who were never married, and who, of course, had no children. 2. Relating to women who had children by a former husband.

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[*] The first class is the most numerous, and the ground of relief in these cases is fraud. Fraud consists in falsely holding out, that a woman has an estate unfettered, and that the husband will be, of course, entitled

(3) See also Mr. Cor's Report, 2 Cox, 28.

to it. No case has yet established the rule that all conveyances by a wife before marriage are void, merely because not communicated to the husband. There may have been marriage-settlements in all the cases cited, but they are so shortly stated that it does not appear. The case cited from 2 Ch. R. is also reported in Eq. Abr. without taking notice of the settlement. Hence we may infer that circumstances may have been omitted in others. In that case the husband refused to marry the woman, when she insisted on having her estate conveyed to her separate use. No question but it is fraudulent, if the wife holds out that there is no settlement, even although it be in favour of a child. (4)

The next case is *Carlton v. Earl of Dorset*. There the case in Ch. R. is relied on, and besides, the decree is founded on the deed. The other case there cited is too loose to be relied on, and, if the other cases afford a rule, that one cannot stand in the way. The case in *Freeman* is only a dictum, and not to be regarded.

The result of the first class of cases is, that, if there be any fraud, if the wife holds out that the husband will be entitled, on the marriage, to her property, the deed is void. But they go no farther. If such deeds were universally void, the other class of cases could not have existed; for children could make no difference. If they are good in any case, to avoid them the party must shew to the Court, that the husband has been deceived; mere concealment alone is not enough.

In *King v. Cotton*, the concluding reason given by the counsel is, that there was no fraud or imposition on the husband, who did not pretend he could make any settlement: now, it is material to observe that the reporter immediately adds, "for these reasons the Lord Chancellor dismissed the plaintiff's bill, &c." That case is not like the present. Here *Mr. Bowes* is plaintiff; he seeks equity, he must therefore do equity. He demands to have this deed set aside, without offering to make any provision for the wife, this is a ground for refusing relief. In all [*] cases, where a husband comes here for his wife's fortune, he must make a settlement.

The cases do not establish any rule of law that obliges me to say the deed is void. The circumstances of this case will not entitle the plaintiff to relief.

Down to the 16th of January, Lady *Strathmore* intended to marry *Grey*; till then, the plaintiff may have been a stranger to her. The story of the sham duel is stated in the evidence, and not contradicted. In consequence Lady *Strathmore* pays attention to *Bowes*, and deserts *Grey*. A man who begins by such a stratagem is not entitled to much consideration in a court of justice. It however produced the effect intended on Lady *Strathmore*. It was said at the bar, marriage was a contract *sui generis*, and that, by it alone, the husband is entitled to all the rights the law gives a husband. I take it that a man who marries, without a treaty, must be content to take the wife as he finds her. The husband certainly is considered as a purchaser to many purposes by marriage: but this does not hold universally. If so, those settlements in favour of children would have been held void.

Decree, therefore, that the deeds of 10th and 11th of July 1777, are to be established, and an account of rents and profits against defendant *Bowes*, from the filing of the bill.

[This decree was affirmed upon a re-hearing before Lord *Thurlow* C. (5)
3d March

(4) See *Thomas v. Williams*, Mosely, 177.

(5) The editor having been favoured with a comprehensive note of Lord *Thurlow's* judgment on the Re-hearing, which was taken by Lord *Colchester*, thinks its insertion may be satisfactory.

" 3d and 4th March 1789. Lord Chancellor. — I have entertained no doubt in this case from the beginning. A conveyance by a woman before marriage under whatever

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3d March 1789; and afterwards on appeal in Dom. Proc. 19th July 1797. *Vide* 6 Bro. P. C. 427. octavo edition.]

" circumstances made, and though but the moment before marriage, is *prima facie* a good conveyance, and can be avoided only by a fraud. If there be a concealment on her part, there must appear the *animus celandi*. The question always must be, whether the evidence be such as to raise an imputation of fraud. If there were any fraud in this case, it was a fraud not on *Bowes* but on *Grey*; and *Bowes* would have no right to complain of a fraud practised on *Grey*; but in fact there was no fraud on *Grey*. Considering the whole of this lady's conduct, it seems to have been in a lucid interval that she made this conveyance to her separate use. She was mad enough to dispose of herself to any one, but not to give her property to any man whom she might marry. I must consider this case exactly as if the conveyance had been made 10 years before her marriage with *Bowes*, and she had married *Grey*, and lived for several years with him; and considering it so, I cannot see how it is to be distinguished from a separate use, created not by herself, but by a stranger. It has been argued, that Lady *Strathmore* was bound to disclose the state of her property to Mr. *Bowes*, and that in case where the marriage was so sudden that there was no time either for her to disclose it, or for himself to make any enquiry; but it seems impossible to contend that with any degree of seriousness. Decree affirmed."

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[*] HANBURY against HANBURY.

HENRIETTA HANBURY and FRANCES HANBURY, only Daughters of CAPEL HANBURY, Esq. deceased, Plaintiffs.

In Court, 7th, 9th, 13th, 20th, 21st of November 1786, [and 4 July 1788.]

[Decree affirmed on rehearing, *postea*, 529.]

JANE HANBURY, Widow and Administratrix to JOHN HANBURY, Esq. deceased; JOHN CAPEL HANBURY, an Infant, the eldest Son and Heir of the said JOHN HANBURY by said JANE HANBURY, his Mother and Guardian; and HENRY DAGGE, Esq.

Defendants.

(Reg. Lib. 1787. A. fol. 610. b.)

A gift of 20,000*l.* to the daughters, by the codicil to the will of their father, held a cumulative provision for them, without prejudice to their claim of 2000*l.* each under their father's marriage-settlement.

A bond by their brother, for payment of 10,000*l.* out of his personal estate, not a satisfaction for such provision. (1)

THE bill was filed January 23. 1786, and prayed *inter al.* that 2000*l.* provided by settlement of 29th of September 1743, to be raised with interest from the death of the plaintiff's father, might be raised, by mortgage of a term of 500 years, and paid to the plaintiffs, and that a sum of 10,000*l.* (part of a sum of 20,000*l.* secured by the late *John Hanbury's* bond), and also sums remaining due on account of certain annual sums of 200*l.* and 200*l.* said to be paid to the plaintiffs out of the assets of *John Hanbury*, and the further sum of 10,000*l.* should be secured out of the said assets, to be paid to the plaintiffs, upon the death of their mother out of the said assets, or in default out of his real estate.

For this purpose the bill stated that, by settlement dated 24th October 1734, certain lands therein mentioned were settled, in events which have since happened, upon the said *Capel* for life, remainder to his first and other sons in tail-male, with remainders over, in which was contained a power for *Capel Hanbury*, when in possession, to charge the premises with 2000*l.* for younger daughters, with maintenances, not exceeding the interest: and further stated that, by settlement 29th of September 1743, previous to the marriage of *Capel Hanbury* with *Jane Tracy*, he charged the lands accordingly; that the marriage took effect, that *Capel Hanbury* died the 7th of December 1765, leaving *Jane* his widow, an only son, *John Hanbury*, and the plaintiffs [*] his only daughters and younger children, by which they became entitled to have the 2000*l.*

(1) See *Warren v. Warren*, *antea*, 1 vol. 305. and the Editor's notes. *Vide* also *Richman v. Morgan* and *Pearson v. Morgan*, *antea*, 1 vol. 63. *et postea*, 388.

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raised; that *Capel Hanbury*, by will the 25th of *March 1750*, (previous to the birth of *Francis Hanbury*) gave to plaintiff *Henrietta* the sum of 4000*l.* to be paid out of a particular mortgage, and after the birth of plaintiff *Frances*, and before her baptism, 10th of *April 1759*, made a codicil to his will, by which he left to plaintiff *Frances* (by the name of his new-born daughter, who was to be called *Frances*), 5000*l.* charged on lands therein mentioned. That *Capel Hanbury* afterwards, 30th of *May 1759*, gave *Frances* 5000*l.* more, in the whole 10,000*l.* charged on his personal estate. That he, afterwards, made a third codicil, written on the same paper, in which his will and two former codicils were written, and attested by two witnesses, and thereby revoked all that part of his will relative to the plaintiff *Henrietta*, and gave the sum of 20,000*l.* to be equally divided between the plaintiffs, to be paid down, or sufficient security given for the payment thereof, within thirty days of either of them being married, provided the person to whom she should be married should settle on her a jointure of 500*l.* per annum. And otherwise she should be entitled but to 5000*l.*, and the remaining 15,000*l.* should be wholly paid to the unmarried sister, who was not entitled to more than 5000*l.* unless she should marry by the consent of her brother, if living, but, if he should be dead, the testator left his whole real and personal estate to *Henrietta*, upon paying *Frances* 12,000*l.* upon her marriage-day. The bill further stated, that *Capel Hanbury* not having appointed any executor, administration was granted, with the will and codicils annexed, to *Jane* his widow, and *John* his son; and that a bill was filed in *Hilary* term 1766 by plaintiff *Henrietta* against *John*, *Jane*, and the present plaintiff *Frances* for the legacy, and a decree was made in the cause, by which the usual reference was made to the Master, to take an account of the personal estate of *Capel Hanbury*, but no direction given as to the legacies. That in *March 1768*, the personal estate being so circumstanced that it could not be determined whether it would be sufficient to pay the debts and legacies, a bond was entered into by *John Hanbury* (the plaintiff's brother) to the late Baron *Tracy* and the defendant *Henry Dagge*, in the penal sum of 40,000*l.* with a condition underwritten reciting the will and codicils of *Capel Hanbury* as aforesaid, and the doubt of the [*] sufficiency of his personal estate, to pay the debts and legacies, and that nevertheless that *John Hanbury* was desirous to effectuate the intention of his father, by securing the sum of 20,000*l.* for the portions of his sisters, with suitable allowances for maintenances till they should attain 21 years of age or be married: the condition of the bond was, therefore, that *John Hanbury* should pay 5000*l.* each to the plaintiffs, upon their attaining their ages of 21 years, or days of marriage, with maintenances as therein secured, and should secure 5000*l.* more to each of the plaintiffs, to be paid on the death of *Jane Hanbury*, his and their mother, if they should have then attained their ages of 21, or should be married; otherwise at their ages or marriage as aforesaid, with interest at 4 per cent. from the death of the mother; and it was declared that the bond should only be a security for the portions and maintenances, in case, at the final hearing of the cause, it should appear that there were not sufficient assets of *Capel Hanbury* to pay the 20,000*l.* given to the plaintiffs, and if it should appear, that the personal estate of *Capel* was sufficient, the bond should be void. That the bond was executed in the presence of *James Dagge*, who made an attested copy of it, which was the copy produced in court, but the original bond had been lost or mislaid, and could not be found. That no further proceedings were had in the cause, but that *John* stated an account of the personal estate of *Capel* which had come to his hands, by which it appeared the personal estate was not sufficient to pay the debts and legacies. That *John Hanbury* died the 6th of *April 1784*, intestate, leaving defendant *Jane Hanbury*

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Hanbury his widow and defendant *John Capel* his eldest son and heir at law, and defendant *Jane* obtained letters of administration of his personal estate. That plaintiff *Henrietta* attained her age of 21 years, the 11th of *February* 1770, and *Frances* attained her age the 2d of *April* 1780, and thereby became entitled to 10,000*l.* and that several sums had been paid by *John Hanbury*, and since his decease, by *Jane* his widow, for maintenances and interest on the bond. By the answer, the settlements were admitted, but it was introduced into the cause, that, by the indenture of 29th of *September* 1743, 3000*l.* the portion of *Jane Tracy* was assigned to trustees upon trust, to permit *Capel Hanbury* to receive the interest for life, then to permit *Jane* to receive the interest for life, and after the death of the survivor, the principal to go to the younger children of the marriage in such shares as *Capel Hanbury* [*] should by writing appoint, in default of appointment, to all the younger children of the marriage equally, and that *Capel Hanbury* covenanted to pay to the trustees 5000*l.* to the like uses. All the other material facts were admitted, but the defendants insisted that *John Hanbury's* giving the bond in trust for the plaintiffs, and thereby securing them a more certain provision than they were entitled to under the will and settlement, was intended by him as a satisfaction, and that the plaintiffs had from the times of attaining their ages of 21 years accepted the same, and made no other demands.

This case was argued the 7th, 9th, 13th, 20th, and 21st of *November* 1786.

Mr. *Hardinge*, Mr. *Scott*, and Mr. *Mitford* (for the plaintiffs).—The expression in the former decree, that it should be without prejudice, relates only to the wills and codicils, and the bond, being in satisfaction of *all claims* under the wills and codicils, the 20,000*l.* being a claim under the will, is barred by it. *John Hanbury*, in his life-time, settled an account, by which it appeared, *Capel's* estate was deficient 4 or 5000*l.* the bond therefore operated.

Two points arise in the case.—

1st. Whether the gift of the 20,000*l.* revokes the 2000*l.* under the settlement.

2dly. Whether *John's* bond, given in discharge of the 20,000*l.* is a satisfaction for the 2000*l.*

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As to the first question, the 2000*l.* and the 20,000*l.* came from different funds and different persons. The 2000*l.* from the real estate, under the power in the settlement, the 20,000*l.* from *John's* estate, and is therefore within the case of *Walpole v. Conway*, Barnardist. 153. As to the will and codicils, they are progressive acts of bounty; the question is, whether they amount to a satisfaction of the portions. There is no rule, that where a portion is provided, it shall be satisfied wholly or *pro tanto* by a subsequent legacy without more appearing. By the cases, from *Blois v. Blois*, 2 Ch. Rep. 162. to [*] *Warren v. Warren* (*ante*, vol i. p. 305.) it appears the testator meant to dispose of the property subject to the portions. In *Blois v. Blois*, Sir *William*, having given the 3000*l.* out of the estate, the court inferred he meant only one 9000*l.* that the other dispositions in the will might not be disturbed. So in *Bruen v. Bruen*, 2 Vern. 439. the court thought the second provision was out of the same estate. In *Copley v. Copley*, 1 Wms. 147. the will says the 8000*l.* shall be for the daughters' portions. That case must have been decided upon the intention of the testator. An election among the provisions was given. In *Grimes v. Allieurs*, 3d of *February*, 1751 (A), one circumstance

(A) *Barkin*, by the settlement on his marriage with the defendant's mother, made a provision of 4000*l.* for the younger children of the marriage, payable at 21 or marriage, with 50*l.* *per annum* maintenance for each in the mean time.

stance that weighed with the court was that one portion was contingent, *Jesson v. Jesson*, 2 Vern. 255. is no authority against the plaintiffs, the provision in the settlement was for daughters *not preferred*; therefore, as to the 1800*l.* raised, the daughters were preferred *pro tanto*. In *Bellasis v. Uthwatt*, 1 Atk. 427. Lord Hardwicke said, it "could not be given as a satisfaction, but as a double portion." If the father had expressed his idea in giving the Exchequer annuities, she should not have had both. In *Clarke v. Sewell*, 3 Atk. 98. Lord Hardwicke stated the case, as to the courts leaning against double portions, that where the provisions move from the same persons, the estate shall not be incumbered twice. In *Duffield v. Smith*, 2 Vern. 253. this point of portions moving from different persons is carried to a great length; the brother, having the power to give the reversion in fee, it was not necessary he should mean it as one portion only. In *Thomas v. Keymish*, 2 Vern. 348. the provisions both came from the same person. To apply these cases to the present, independent of former decisions, there is no evidence that *Capel Hanbury* made these provisions by his will and codicils in lieu of the 2000*l.* The portions are of three sorts, the provisions could not be meant as satisfactions for the 3000*l.* and 4500*l.* but only for the 2000*l.* and 500*l.*: the 2000*l.* was not a provision of his, and must have been meant in addition to the 3000*l.* and to 4500*l.* The words *her whole fortune of 4000*l.** could not mean all, as, if there was one sole daughter, she would have 10,000*l.* When the testator made the first codicil, he could not have forgot the settlement; as he gives the 5000*l.* out of the estate not in settlement. By the second codicil the 10,000*l.* is payable out of the personal estate. He could not mean the 4000*l.* in full, and the 10,000*l.* in full. The third [*] codicil revokes both the others. Part of the provisions are contingent and distant in point of payment. As to part, no interest is given: can the testator be considered as the same person who gave the portions, and the 2000*l.* which was the gift of *John* the settlor, *Capel's* settlement being only the execution of a power?

Mr. *Mansfield* (for the defendants) stated the case at large. — This is an attempt now in 1786, to obtain, from the heir of *Hanbury*, the sum of 2000*l.* out of this estate. Upon the will and codicils *Henrietta* and *Frances* are entitled only to 20,000*l.* If the construction of the bond therefore be only doubtful, I trust it must be taken to be a satisfaction of their claims, and that *John Hanbury* was a purchaser of the rights of his sisters.—Nothing has been said, on the other side, on the operation of the bond.

I shall, 1st. consider the question as it stands upon the will and the codicils.—Several cases have been referred to on the general question of satisfaction, where portions are given by a settlement, and a subsequent sum given by will. In all the cases, except two, the legacy has been held a satisfaction. Those two are *Duffield v. Smith* and *Bellasis v. Uthwatt*; both of them turned on the special circumstances of the cases. In all the others, the legacy has been held to be a satisfaction. Mr. *Scott* aimed at a distinction, that there was no general rule, but that every case stood on its own circumstances: but there is a rule, that if a parent gives a legacy, whether greater or less than the provision by settlement, it shall be a satisfaction, unless there are circumstances to shew it was not so intended.—The case of *Copley v. Copley* is a very strong one. It was held a satisfaction, not only for what the father had given, but what the

He had four daughters, and by his will he gave them 1500*l.* payable also at 21 or marriage; and made another provision for his wife, and confirmed the settlement made on his marriage. Held, the daughters intitled to both portions; a less subsequent one no satisfaction for a greater prior one. — From Mr. *Brown's MS. note.*

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grandfather had given also: so in *Jesson v. Jesson*, the second portion was payable at a different time. *Warren v. Warren* does not afford any inference. It was clear there that the testator was making a settlement by the will, and that he had forgotten the settlement. In *Byde v. Byde* (2), there cited in a note by the reporter, the legacies were less than the provision by settlement; but Lord *Northington* thought they were in satisfaction. There is also another case cited there, the Duke of *Somerset v. the Duchess of Somerset*. From all the cases, it [*] appears that wherever there is a legacy given by a father it shall be a satisfaction, unless clearly intended otherwise, *Clarke v. Sewel*; *Barret v. Bockford*, 1 Ves. 519.; *Wood v. Briant*, 2 Atkyns, 521.; which last is a strong case. The rule is that the father shall not be presumed to intend giving two portions. In *Clarke v. Sewel*, Lord *Hardwicke* draws the line between debts and portions with great accuracy. In the present case *Capel Hanbury* at the time of making the will and codicil, had not the settlement before him, but he uses the words emphatically, *her whole fortune of 4000*l.** shewing strongly his intent at that time, that 4000*l.* should be her *whole fortune*. In the first codicil he expressly provides for *Frances's* maintenance. He acts like a father, in giving the child her whole fortune, and taking no notice of the settlement.

Then as to the codicil giving the 20,000*l.*

Lord *Chancellor*. — If a father had settled 6000*l.* each on his children, and afterwards gives to a daughter 1000*l.* for any purpose whatsoever, having immensely increased his fortune, shall she take nothing by the will?

Mr. *Mansfield*. — These are questions of intention: evidence may be, and has been, received, in a great number of cases, in Lord *Hardwicke's* time. The effect of the last codicil is to give the daughters only 5000*l.* each, if they married against the consent of the brother. Then comes a very important provision. He supposes the son may die before the daughters married, then *Henrietta* is to have all his real and personal estate, paying 12,000*l.* to her sister. He meant that to be all she should have. It is fair to argue in the same manner as to the son. He would throw no greater charge upon him than on *Henrietta*. On these observations, there are as strong marks of the testator's intention that the daughters should not take more than the legacies in the present case as in any of those where they have been held to go in satisfaction. *Shadell v. Jekyl*, 2 Atkyns, 516. But, against this, the case is argued upon its special circumstances; and those cases were relied upon where the fortunes come from the same person. But *Copley v. Copley*, *Wood v. Briant*. The case, 2 Vern. 484, the Duke of [*] *Somerset v. the Duchess of Somerset*, are all cases where the portions came from other persons. In the present case, all came from *Capel Hanbury*, who enabled *John* to make the provision. As to any of the provisions being less than the former, that will not apply to the 20,000*l.* but in *Jesson v. Jesson*, it was held to be immaterial whether the second provision was greater or less. As to its being a satisfaction *pro tanto*, if the bond afforded no answer, the circumstances are sufficient to shew he meant this in satisfaction. 2dly. But what shall we say as to the bond? *John Hanbury* shews, throughout, that he meant to effectuate the intention of *Capel Hanbury*, supposing the assets not to be sufficient, he therefore, expressly, provides maintenance and portions for his sisters. No instrument can more clearly shew that he meant his estate to be liable no further. If he intended to leave the 2000*l.* a charge upon his estate, it is

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(2) Lately reported from Lord *Northington's* MSS. 2 Eden, 19. *quod vide*.

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strange he did not say so. *John Hanbury* lived until 1784; fourteen years had elapsed since *Henrietta* came of age,—four years since *Frances* had attained her age; this acquiescence is sufficient to shew the sense of the parties as to this property. If they lose it, the loss arises from their own neglect.

Mr. *Madocks* (on the same side).—This is a provision out of the family estate claimed by younger children, these lead to the range of cases which say that the court will lean in favour of the family estate, against double portions. That is the original ground of the rule which is laid down by Lord *Hardwicke* in *Clark v. Sewel*.—The intent of the party should govern. In the present case, we must presume his intention was that of a parent who was settling the family estates.

Mr. *Hollist* (on the same side).—I take the rule to be that wherever a parent provides, by subsequent settlement or will, a portion for a child who is entitled to a prior provision, under a settlement made on the father's marriage, or made by an ancestor, out of the family estate which comes to the father, that child shall not have both portions, unless he can shew, from the second settlement, or will, or by evidence, that the father intended he should. He can only have an election which he will take. And it is not necessary that both provisions should move from the father, or that the latter portion should be equally beneficial with the former, or be payable at the same time.—[*] The child is not injured by this rule, for he has always a right to elect the better portion, and the rule is supported by the cases on the subject. The first case is *Pile v. Pile*, Ch. Rep. 199. 8vo. Ed. (106. fol. Ed.) There the Lord Chancellor gave both the portions; but it was upon proof of the testator's declaration, that he intended to increase his daughters' fortunes. *Blois v. Blois*, 2 Ch. Rep. 162. (8vo.) 85. (fol.) the words in the Register books, which are also reported in 2 Ventris, 347. are, that the devise would not double the portions, unless it was plainly proved he (the testator) intended to do so. *Pine's* case is there cited. *Jesson v. Jesson*, *Thomas v. Keymish*, *Brewin v. Brewin*, Pre. Ch. 195. 2 Vern. 439. *Copley v. Copley*, *Byde v. Byde* (3), *The Duke of Somerset v. the Duchess of Somerset*, *Warren v. Warren* are all authorities the same way, that the children shall be put to their election. Mr. *Scott's* observation on *Jesson v. Jesson* does not apply, as the not being preferred was not the ground for presuming against the double portion, but the question was whether any part of the 3000*l.* should be raised, that being for children not preferred during the life of the father, and that is mentioned as the question by the court. The case of *Thomas v. Keymish*, was affirmed in parliament. That of *Brewin v. Brewin* was determined by the Master of the Rolls, and affirmed by the Lord Keeper. It is not necessary the two portions should move from the same person; they did not so, either in *Copley v. Copley*, or in the Duke of Somerset v. the Duchess of Somerset. It is the same although the portions be payable at different times. *Brewin v. Brewin*, *Thomas v. Keymish*.—In *Byde v. Byde* (3), the latter portion was less, yet it was held the children should elect.

Lord Chancellor.—Is there any case where the second portion has been held a satisfaction, that it was not a plenary portion to take effect in all events?

Mr. *Hollist*.—I believe not.

Lord Chancellor.—In this case, by the codicil, unless they marry they will have nothing. I must, in order to hold it a satisfaction, take it be testator meant to give his daughters what he was bound to do by nature, and at the same time that he was to give them nothing unless they married.

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[*] Mr. *Hollist*. — The court will not give double portions, unless it be the clear intent of the parent. *Johnson v. Smith*, 1 Ves. 314. There it was a deed of gift, but the donor kept it in his own possession; then he gave a bond, and afterwards devised real estate on condition, and gave her the personal estate. The daughter was put to her election. — So in the case of *Grimes v. Allieurs*, 29th November 1752, there were 4000*l.* settled upon younger children, the father, by will, gave 1500*l.* among the children, four in number, and confirmed the settlement. *Duffield v. Smith* is very different from the common rule, it was until they could have 3000*l.* raised: the residue of an estate has never been held to be a portion; but that case is not much of an authority, as it is directly contradicted by *Thomas v. Keymish*. In *Bellasis v. Uthwatt*, the exchequer annuities were not a portion, but a property coming to the daughter (who was the only child) under the limitations in a settlement. It was decided on the question of satisfaction, and Lord *Hardwicke* would not imply a satisfaction. *Williams v. the Duke of Bolton* might be added; there were different provisions by a deed and by a will, Lord *Camden* put them to an election. To apply these rules to the present case. By *Capel's* will 4000*l.* are given to *Henrietta*, the interest to the mother until the daughter attains 15, then the mother to allow her 40*l.* per annum, and to be at the whole charge of her education until 18, then *Henrietta* to be in possession of her whole fortune. By the first codicil 5000*l.* is provided for *Frances*, to be laid out by the trustees, *Frances* to have 80*l.* per annum until 15, and then the whole income until marriage. Both these are within the description of portions. The third codicil is singular. It revokes the legacy to *Henrietta*, but does not, in terms, revoke that to *Frances*; different provisions are made for each in different events. He meant unless they married they should each have but 5000*l.* but that they were to have at all events. If they were both unmarried, and *John* died without issue, *Henrietta* was to have the whole, paying 12,000*l.* to *Frances*. If the father intended these as portions, it is not material that they are contingent, as the daughters have an election, and he has done enough to put them to an election, as to the 2000*l.* charged on the family estate coming by settlement to the son, or to take under the will. The consequence of their taking the 2000*l.* would be that the estate would go over unburthened; if they take under the will [*] the father is a purchaser of the portions. *Jesson v. Jesson*, *Thomas v. Keymish*, *Brewin v. Brewin*. In *Walpole v. Conway*, Barnardiston, 156. Lord *Conway* was declared to be a purchaser, by the legacies given in his will, of three fourths of 5000*l.* he having taken notice of the 5000*l.* as his own property, and the executor took it, in opposition to the heir, though the money was to have been laid out. Here was an open declaration that he was to have the money as his own property, but it does not appear how far such expression is necessary. In cases of subsequent portions by will, the donor is in the nature of a contractor or purchaser for some body, and may be considered as saying to the children, you shall not have my provision unless you will give up the other. The usual purchase or contract is in favour of the estate and the persons succeeding to it, and sometimes the eldest son, the tenant in tail; in *Jesson v. Jesson* it was for the son of the 1st marriage, as heir in tail of his father, and, if there had not been that son, it would have been for the father in fee; in *Thomas* and *Keymish* it was for the right heir of Sir *Thomas*; in *Brewin v. Brewin* for the testator's heir, who was his uncle; in *Copley v. Copley* for the father's devisee. In these cases the donor acquires the benefit. Here is no expression where the benefit should go, but, the burthen being upon the land, the court infers it from his silence: but, further, the plaintiffs are entitled to the whole 8000*l.* (subject to the mother's interest for life) as well as the 2000*l.* The case is a case of election. If the settlement gives the better provision, they will

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will elect it, and abandon the provision under the will. The consequence is, that these provisions will fall into the father's estate for the benefit of those entitled to the residue. But suppose the provisions under the will to be the better, they will come into equity to ask for them in preference to the portions. What is the justice and equity of the case? If you will ask so much to the diminution of the donor's estate, give up to it that which is yours, in lieu of which he intended the second provision. The fair construction therefore to be drawn from the whole is, that if the plaintiff elect the provision under the father's will and codicil, they should make over their interest in the 3500*l.* and 4500*l.* for the benefit of his personal estate. This is the case as it stood against the representatives of *Capel*, when the cause was last heard, and such would have been the course of argument, then, if the cause had been argued; as it was not [*] the case is open. But taking the bond into consideration, and supposing it proved by the plaintiff, the case requires a different consideration. At the time when the bond bears date, this was the situation of the parties, *John* was about twenty-three or twenty-four, in possession of the estate charged with the 2000*l.* *Harriet* was nineteen, *Frances* nearly nine; they were intitled, either in possession to the 2000*l.* with interest at four *per cent.* and 8000*l.* at the death of the mother, or to the provisions under the father's will, or at least *John* supposed so. They had sued for the 2000*l.* but no direction had been given about it, and nothing had been claimed about the 8000*l.* but the 5000*l.* The father's personal estate certainly was deficient as to answering the 20,000*l.* and though stated as being 16,000*l.* yet it was not so, as outstanding and bad debts were stated as being in *John's* hands, the unsatisfied debts stated were only those which had come to *John's* knowledge, and those were legacies and annuities given to other persons. In this situation the bond was prepared and executed. Its effect was to give the plaintiffs 5000*l.* each, payable at twenty-one or marriage, being the same time with the 2000*l.* It provides 200*l.* a year for *Henrietta*, 100*l.* for *Frances* till fifteen years of age, then 200*l.* *per annum*, and 5000*l.* each, more, at the death of his mother, when the 8000*l.* would come to them. These periods of payment look as if the parties had not forgotten the settlement. *John* supposed the intention of his father to be to give his daughters 20,000*l.* for their portions, with maintenances in the mean while, and he was desirous of effecting that intention. If *John* meant this, it is sufficient, whatever be the construction of the will and codicil, if the plaintiffs claim under the bond, they must claim on those terms. *John* made this point in his answer to the first bill, that he understood this to be the meaning of his father's will. His intention seems to have been to secure to his sisters 20,000*l.* which was more effectually for their benefit than to take under the will. *John* therefore made himself a purchaser as to the 2000*l.* charged on land, for the benefit of the land, and as to the rest, for the benefit of his personal estate. The subsequent conduct of the parties shews their understanding of the transaction; the maintenances of 200*l.* were regularly paid, and receipts given; no demand was ever made of the 2000*l.* or the interest of it, and they never prosecuted the former suit.

[*] *Henrietta* came of age in 1770, *Frances* in 1780, four years before the death of *John*. This introduces the argument from length of time, which is very material where there has been an acquiescence. *Macdowel v. Halfpenny*, 2 Vern. 484. *Wood v. Briant*, 2 Atk. 521. *Seed v. Bradford*, 1 Vesey, 501.

Another circumstance, that the bond was never delivered into the hands of the plaintiffs. At the time of the execution of it, they were under age, and could not give a discharge. It remained with *Dagge*, *John's* attorney, which was *John's* possession. It does not appear that the

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the bond now exists. *Ward v. Lant*, Pre. Ch. 182. such a bond kept by the party was set aside. From the little Mrs. Hanbury can collect as to the transaction, John's intention was to give his sisters 10,000*l.* each, in full satisfaction of every demand.

Mr. Hardinge, in reply, stated the *first* and material question to be this, "whether the daughters of *Capel Hanbury* could now demand "the sum of 2000*l.* charged upon the family estate, for their benefit, "by him in the settlement of 1743 without prejudice to their claim of "20,000*l.* given to them in the codicil to his will?"

He said that, upon this question, he would not ask whether *Capel Hanbury* meant a *double* portion (the term being very inaccurate, though in familiar use) but whether he meant a portion limited in its value by the gift in the codicil, or extending to the gift in the settlement.

It was agreed that *intention* was to be the only measure of the gift, but he differed from all the counsel on the other side, each of whom differed from the rest, concerning the habit or principle of the court in the discovery of that measure.

He said it was not the rule asserted by one of them, "that a portion "given by a father, in his will, to one of his children, excludes, *eo nomine*, and of course, a former provision for that same child, by settlement upon the father's marriage."

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Nor was it the rule, though less exceptionable, stated by another of them, "that such an ulterior provision threw the burthen [*] of proof "upon the child, who would unite both of the gifts in his favour."

That much less was it the rule pressed into the service by Mr. *Madocks*, namely, "that an heir of the family estate was preferred, "because the *policy* of this court *leaned* in his favour, preserving to him, "by an artificial rule of presumption, the land which he inherited "against an ulterior charge upon it," that if this were the rule, he would ask when the latter gift was of *more* prejudice to the heir, what became of that policy in favour of the land, as against the interest of the child who (it was agreed) would at least be to elect, and would of course elect the more valuable of the two alternatives laid before him.

"What then was the rule?" The court itself had put this question to the counsel on both sides, adding "so as to reconcile the cases together." He said that if that question meant *all* the cases which could be found in the books, he despaired of the answer to it, but that if it meant all the cases which had been quoted in this argument, or were of good authority, he thought such a rule *could* be found, and stated with precision.

He would begin *his* rule upon solid ground, by repeating the words of the court, in a former stage of the argument, "where the testator, "who is a parent, shall have discovered, *by the manner of his gift*, an "intention of providing to the outside for his child, in other words, of "doing *all* that his parental discretion points out as proper to be done "by him, for the maintenance of that child, he indicates this to pass "in his mind, that no other maintenance be demanded from him, but "that which he has thus measured in his own testamentary disposition."

He said, he would beg leave to introduce a single new term into that very accurate and comprehensive description of the rule, by adding to the "*manner of the gift*" this alternative "*or the circumstances of it, as they appear upon the face of both instruments compared.*"

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It was clear that parol evidence was incompetent, and though one of the counsel had offered him the benefit of it on the one hand, [*] but made it indispensable on the other, he would not thank him for the offer, nor obey the requisition. That *Pile v. Pile* was bad law, and ill reported; but even that case had only ruled parol evidence to be competent,

test, *against* competent presumption. That neither that case nor any other had ruled parol evidence to be *necessary* in support of written documents coinciding with it, where no adverse presumption encountered the natural effect of them.

That facts which appeared in the several instruments themselves, upon which the question was raised, could safely be relied upon, and could in his judgment repel the inference resulting from *the manner of the gift*. That, for example, if the first parental provision by settlement was 35,000*l.* and a latter by will only 5000*l.* yet if by *the manner of the gift*, the latter should appear to be meant as the *ne plus ultra*, he should hope to contend with effect from the *inferiority* of the second gift, against that presumption which might result from the *manner* of it; in other words to contend for an obvious intention of the testator to add the second instead of excluding the first, to contend that he did not mean to consult an illusory discretion of the child, or to leave two such alternatives for his choice, which it would be ridicule to suppose he could make in any way but one. That in this argument, however, he assumed the testator was aware of the first gift at the time of contemplating the second.

That in *Warren and Warren* he had so described the rule himself; but he agreed that it was no authority either way, because it was there, clear of doubt, that the testator had entirely *forgot* the settlement.

He did not agree to what one of the counsel for the defendants had affirmed, that election was the rule upon which the judgment in *Warren and Warren* was built; it was the *consequence*: but the *point* of the decision was this, that it was to the testator's mind as if he never had made any settlement; that it could not be said he meant both provisions, but that he meant that as the only measure of his parental gift, which his will imported, addressing his mind only to that instrument.

[*] He insisted that every other case adduced against his clients fell under the rule of *constructive appointment*, or of *election* upon both of the gifts compared.

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The cases that fell under the rule of *constructive appointment* were these:

1. *Blois and Blois*, Rep. in Chancery, 85. There the testator gave to one of his daughters 3000*l.* by settlement, charged it upon land, and expressed that he meant her no more. He made his will, and gave her that identical amount charged also upon land. This was an appointment by which the testator kept his word.

2. In *Brewin and Brewin* lands in trust were charged, in settlement, with a sum for a portion, which identical sum was again thrown upon the same fund by will, it was held that he meant one portion of 3000*l.* charged upon land.

3. *Byde and Byde* (4) is an authority of much the same import.

Two of the cases mentioned by Mr. *Hollist* are cases of pure election, for they are cases in which the testator, for the purpose, *inter alia*, of a portion, acts, in the will, upon a particular and specific fund, as liberated, and his own, which he had charged with a portion to the same child by settlement. In *Conway and Walpole* 5000*l.* is given by settlement; then by will the 5000*l.* is made part of the fund allotted for a portion: what say the court? "you must not have the fund and the legacy too."

As to the case of *Bryant and Webb*, quoted by Mr. *Mansfield*, it was a jumble of the parental and the acquired obligation by debt, nor was it the case of a will. A father, who was debtor to his child, gave her a

(4) 2 Eden, 19.

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portion in his life-time, upon which, as preferable to the debt, she made her election.

He said that in the various cases upon this complicated head, some clear and marked rules presented themselves to the view, as forming the law of the court, and they were all of them essential to a right judgment of the particular question at issue.

[*] First, "It must have been the testator's *own estate* that was made the fund of the gift by settlement."

He mentioned this rather with a view to the sum of 3000*l.* charged upon the *Tracey* estate in the settlement of 1743 than to the 2000*l.*; though it had struck him, at first, that it would bear a little upon the latter, as it certainly would if the charge by *Capel* could be considered as an instrument of the gift created by *John*, who provided the fund for it; but as applicable to the sum of 3000*l.* the rule was clear of doubt, and he should in the sequel engraft an argument upon it, of great importance, as it struck *him*, to the construction of the will.

That in *Walpole* and *Conway* this rule had been carried very far; for it had been there held, that the fortune of the wife put in trust for the purchase of land first applicable to a life estate in the husband and the wife, then to portions of the children, and such children too, as the husband should select, or in default of such appointment, with a remainder to the younger children in tail, and an ultimate remainder to the husband in fee was *not* satisfied *primâ facie* by a will of that husband, in which he gave a larger portion, expressly, *because it was the estate of the wife*: but the doctrine of election attached upon the other circumstances of that case.

Secondly, essential differences, and for the worse, in the testamentary gift, are taken as proofs of the intention that what the testator had given by settlement, should be coupled with his provision by the will, in favour of the legatee, where it appears that he is aware of the former gift, or the reverse does not appear.

That he conceived the reason of that rule to be, that such an inferior provision by will, cannot be reconciled with an intention to exclude from the benefit of the better gift by the settlement.

That no case had been, or could be, found, in which, under circumstances like these, the legatee had been driven to an election.

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[*] That, in a word, according to the cases, either the testator must have completely marked, by the *will alone*, the indication plain of his purpose, to exclude from any thing beyond the testamentary gift, or, the manner of that gift importing such a purpose, no intention to give cumulative legacies must have appeared upon the face of *both instruments compared*.

That, in *Clarke* and *Sewel*, as Mr. *Mansfield* had said, Lord *Hardwicke* had certainly distinguished between *debt*, strictly so called, and *portions*, by considering the differences between the two gifts, in the latter case, with more liberality than between the debt and the gift in the former—but how with more liberality? Lord *Hardwicke* himself has explained it,—“by overlooking *little* differences in the time of payment,” not *essential* differences of any kind. *They* were never overlooked.

That he would immediately produce two examples of the rule, both of them directly applicable to the case of a child, and both decisive in their application to the very point at issue.

The first example was that of a second portion, given by will to a child, of an amount inferior to that which had been given to the same child by a settlement. In this case both portions would certainly take effect.

That in *Rawlins v. Powell*, 1 P. Wms. 297. the words of the court are very

very significant, importing that if the legacy be as great as the portion by deed, or greater, the intent of the legacy was to secure the former provision.

The case of *Savile v. Savile*, Select Cases in Chancery, 32. was decided upon special circumstances and clear intention: but Mr. Justice Tracy repeated and confirmed the assertion at the bar, that there was no case of excluding the former provision where the second was of inferior amount. — In *Barret v. Beckford*, 1 Vesey, 519. the doctrine is that the testator, having bound himself by settlement as to portion of a given amount, a like or greater provision by will, excludes from the benefit of that former gift. In *Grimes v. Allieurs* the Court said, they had never gone so far as to deduct the less portion by will, from the larger by gift. Against these authorities no case existed in the books. — *Hartop v. Whitmore*, and *Jesson v. Jesson*, were cases of advancement, [*] operating upon a gift; and, in one of them, the gift had expressly been qualified by the terms, “unless preferred in my life.” *Warren v. Warren*, as he had said before, was a case *sui generis*, the mind of the testator there addressing itself to no prior gift, or conception of it.

The second example of the rule was this, that a contingent legacy of a portion, cannot affect the absolute gift of another portion by settlement; for an obvious reason, what is contingent may be nothing, and how could the testator, especially too when a parent, mean to give nothing in lieu of something?

Mr. Mansfield had, by two words, given the full benefit of this doctrine to the plaintiffs; for, in stating the rule of the second portion as excluding the first, he added, “unless contingent,” though, upon the contingency, in the very fact of those legacies, he observed a perfect silence.

That, upon this rule, he could, with equal confidence, because with equal safety, call for a case on the other side.

That, in *debt*, it was clear of dispute.

That, if portions were to pass under a different rule, the cases would prove it.

That *Copley v. Copley* was not a case the other way, as it had been argued, for it appeared there, by the precedent as it had been examined recently by Mr. Cox, that the Court went upon collateral evidence of the intention to appoint under the settlement.

That, in *Bellasis* and *Uthwatt*, the rule was expressly declared as he had stated it.

That in *Grimes v. Allieurs*, the second provision was the larger, but it was held as cumulative, because in the second provision there was no benefit of survivorship as between the children, which in the former gift there was.

That, if these principles were the law of the court, his clients, the Miss Hanburys had laid a sufficient ground for a decree in their favour, by excluding all pretence of satisfaction as applicable to their legacies.

[*] That, when *Capel Hanbury* took up the pen to write his will, he had only one daughter, entitled, strictly, to no less than three portions, according to the technical sense of the words — that her first portion was the 2000*l.* under the power given to *Capel Hanbury* by *John*: for that sum was a charge upon *Capel's* life estate, with a power in him to appoint and apportion amongst his younger children, by a deed in writing properly attested, and also to direct maintenance not exceeding 4*l.* per cent.: and it was provided, that, if he should make no appointment, the sum should be divided equally amongst his younger children, with benefit of survivorship, or go to his only younger child, payable at their age of 21, or marriage: no appointment was made. Her second portion was the sum of 3000*l.* secured upon *Jane Hanbury's* family estate: that sum had

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had been limited thus: to *Capel Hanbury* for life, to *Jane Hanbury* for life, then to their children, as *Capel* should appoint, and, in default of appointment, the same provision as in the case of the 2000*l.*; no appointment was made of that sum. Her *third* portion was due to her under the covenant of *Capel Hanbury* for 5000*l.* which he was to deposit in the hand of trustees, and receive the interest of it for his life, then his wife to receive the interest, and the principal sum, after their death, was given to his appointment, &c. and, just as in the case of the two other portions, except that a power was given to the wife, surviving *Capel*, to appoint and advance any part of the sum at her discretion. Of this 5000*l.* 4500*l.* had been deposited, and *Capel* had made no appointment.

It must not be forgot, that, in all of these provisions, there is a benefit of survivorship given to the younger children.

That this might be called, at the time of making the will, a fortune of 10,000*l.* Miss *Hanbury's* whole fortune of 10,000*l.*, 7000*l.* his own gift (and so it is argued on the other side) 3000*l.* the subject of his appointment, and given by his own settlement, though it sprung from the fortune of his wife.

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Under the impression of these rights in his then only daughter, *Capel* makes his will, and, though upon his will, abstracted from the codicils, no question is made, it is fair to argue from it, and it speaks unanswerably in favour of the Miss *Hanburys*, for this reason, because, if the will did not mean to affect [*] the portions given by the settlement, there is no pretence to say that the codicils had any such intention. — That the will did not mean it, is evident, because, 1st, it makes no recital of the settlement; and 2dly, in what it gives, it has no implied reference to the power, nor allusion or analogy to it; 3dly, it leaves the 10,000*l.* untouched; and 4thly, it charges another estate with an ulterior provision for the wife, so far improving upon her jointure, though it is not contended that she had lost her jointure by that improvement of it, or must elect between the two provisions. He gives, in this will, 4000*l.* to his daughter; he directs her maintenance, and gives to her, at 18 years of age, her whole fortune of 4000*l.*: this must clearly mean the whole of that fortune which is alone the subject of his will. This testamentary portion is perfectly consistent with his daughter's claim to the 2000*l.* to the 5000*l.* and 3000*l.* united, or separately considered. The manner of the gift indicates one portion amounting only to the 4000*l.* But, if both the instruments are compared, that indication is repelled, and the words *whole fortune* cannot have been intended as importing the whole she would claim under any gift from him: could he mean to exclude her fortune of 10,000*l.* by the gift of this 4000*l.*? could he mean to say my daughter is entitled now, *i. e.* at my death, to 2000*l.* with interest, she is entitled further to 7500*l.* perhaps to-morrow, by the death of her mother *Jane*, as to the whole sum, or, by *Jane's* appointment as to 5000*l.* of which 4500*l.* has been paid by me in performance of my covenant — I give to her, so entitled, 4000*l.* payable at her age of 18 years; and I mean that she shall take this in full of the other sum, or elect: I call back the 4500*l.* which I had paid: I purchase the 10,000*l.* by 4000*l.* and I purchase the contingent acceleration of a part of the 10,000*l.* under the power I have given to *Jane*, whose discretion I take away? (Presumed satisfactions have gone great lengths; but this is the first instance of satisfying, by the gift of *A.*, a casual interest which depends upon the discretionary act of *B.*) An intention so understood, must have been the intention of perfect insanity. It is enough to observe upon it, that it makes the testator offer less, by more than half, as an equivalent.

[*373] If he meant an appointment, as one of the counsel for the defendants argued, he must have looked at the power; yet it happens [*] that, having

having the power thus before him, he has anxiously varied the fund, and has omitted the two witnesses required by that power.

But the court has put a difficulty here in the way of the defendants, which is inextricable, by observing that, if the fortune given to *Harriot* by the settlement is gone from her by the will, it goes to her sister *Frances*, which gives to that sister only 5000*l.* out of a different fund, and, by the first codicil is thrown back upon *Harriot*. Thus far as to the will.

By the *first codicil*, preference clearly is intended as between the two daughters, a thousand more being given to the new-born daughter, 80*l.* a year till she arrives at fifteen, and then the full income of her fortune till her marriage, then she is to have her whole fortune; yet this apparent preference is no preference at all, unless the will is pure bounty as well as the codicil.

In this codicil, too, there is a circumstance very marked, the 5000*l.* is charged upon estates purchased by *Capel* in *Monmouthshire* after the settlement; so that, here again, the estates in that same county which he had made the fund for the original fortunes are avoided, and a new fund is called forth: could this again be inadvertency or accident?

The first codicil, therefore, is of no use to the defendants, but operates the other way.

As to the second codicil. — He there calls *Frances* his *darling child*, and gives her 10,000*l.* in the whole. Here this question may be asked — if the first codicil is independent of the settlement and cumulative in its provisions, why should the second codicil be taken for an appointment or satisfaction? On the other hand, if the second codicil is to have a different construction from the first, and will satisfy the settlement, it will have this effect; it will add as the portion of *Frances* 5000*l.* so as to make her fortune 10,000*l.* which is the very sum that mere benefit of survivorship gives to her by the settlement.

It must be owned, that, in the *third codicil*, there is an exact coincidence in the sums between that codicil and the settlement. [*] But if the young ladies do not happen to marry, they are not by that codicil to have a shilling. Can this arrangement be a satisfaction of the *parental debt*, as the court has so properly called a parent's duty in providing for a child? By that codicil too, if one of them *should* marry, but her husband has an estate of less than 500*l.* a-year, half the 10,000*l.* is forfeited by the daughter so marrying.

Another condition is imposed; that, if *John Hanbury* dies, all the estate goes to *Harriot*, paying 12,000*l.* to *Frances*, so that, in this event, her marriage will entitle her to 12,000*l.* but unmarried she will have nothing.

Driven from the idea of satisfying 10,000*l.* by 4000*l.* the argument leaps over the first and second codicil; but supposes the 10,000*l.* given by the third codicil to have been intended as an equivalent for the 10,000*l.* by the settlement.

The difficulty is not removed by this proposition, if the 10,000*l.* given by the settlement is examined.

Part of it is 4500*l.* paid by *Capel*, and that sum, (together with 500*l.* more) is the subject of an appointment by the wife, and in this view, not amenable to the doctrine of satisfaction.

3000*l.* (out of the remaining 5500) is the wife's estate, and by the rule in *Contoy's* case, cannot be affected by the husband's gift.

If the 2500*l.* that remains be supposed the sum in the testator's view, as the object which his intention bid him satisfy, let the intention so ascribed be put into words, and the idea will appear so whimsical that special words must have been used by the testator to mark it, or it will never obtain credit.

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" You,

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" You, my daughters, are entitled, between you, to a fortune of
 " 10,000*l*. I add in words 20,000*l*. so as to make your whole fortune
 " 30,000*l*. Having done this, I mean to be understood as lopping off
 " just the sum of 2500*l*. out of the 10,000*l*. provided for you by the
 " settlement, and, adding [*] the remainder of that provision to the
 " additional 20,000*l*, I mean to have it understood that the whole for-
 " tune given shall be 27,500*l*: in other words, I mean to have it under-
 " stood that every part of the 10,000*l*. shall be intended by the gift I
 " have made in the will, except the 2500*l*. though, out of that sum,
 " 500*l*. cannot be satisfied without an indirect countermand of the con-
 " fidence I had reposed in my wife as to her appointment of that sum."

From the whole of the will, independent of the codicils, it is clear of
 doubt that *Henrietta* was not meant by the testator to be excluded from
 the 2000*l*.

If the will cannot have this effect, the codicils, which must be go-
 verned by the same general rule of construction, can as little exclude
 her share in it with her after-born sister, for the reasons which have
 been adduced.

Independent therefore of the bond, there is nothing which marks a
 satisfaction for the gift in the settlement.

As to the bond of the son to his two sisters, this is clear, that he
 having the distinct knowledge of their claim to the benefit of the settle-
 ment, and having recited their claim to the 10,000*l*. gives the bond as a
 mere security for that sum, independent of any other claim. The bond
 clearly indicates a purpose to satisfy what the father had given as tes-
 tator; there is even an anxious exclusion of any reference to gifts in
 any other view.

As to acquiescence, for such a length of time, in these payments
 under the bond, without further prosecution of the original claim under
 the settlement, it should be remembered that even in 1783, they had,
 personally, no conception of their own original claim as a fact; but their
 brother knew it, knew their ignorance of it, never undeceived them, and
 cannot therefore have the benefit of their non-claim resulting from a
 misconception of their interest, which originated partly in the negligence
 of their trustees, and partly in his own deceit.

[*376] Lord Chancellor. — I cannot take notice of the private views of the
 parties. The bill is to raise 2000*l*. I do not see that the [*] daughters
 have been paid any thing: I have not either the bond or the legacies
 before me, except in argument. It will be necessary to know more of
 the bond, whether it ever was delivered out, whether the sum secured
 by it was ever received, and whether any claim was ever made on ac-
 count of the 2000*l*.

The bond being afterwards found, a fresh application was accordingly
 made to the court; in which it was insisted, that the bond was only
 delivered as an escrow but this was not made out in evidence. The
 cause came on to be heard during the sittings after *Trinity* term, and
 was argued much to the purport of the former argument, when Lord
 Chancellor was pleased to decree for the plaintiffs, saying, shortly, that,
 upon considering all the cases, he could not distinguish the present
 from them, and, therefore, he did not think the bond a satisfaction for
 the other provisions. (6)

(6) Decree affirmed, on re-hearing, *postea*, 529. *Quod vide*.

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[*] JOHN COMPTON, Esq. sole Executor and personal Representative of JOHN WILLIS, deceased. - - - Plaintiff.

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Mr. Justice Buller for the Lord Chancellor, 20th [and 24th] of June.

THOMAS COLLINSON, MICHAEL COLLINSON, JOSEPH SPARKS, EDWARD SHEWELL, JOHN TAYLOR VAUGHAN, PETER THELLUSON, EMERSON CORNWALL, PAUL MAYLLOR, CHARLES STEYNSHAM COLLINSON, HENRY COMPTON, Junior, Esq. Sir CHARLES COCKS, Bart. and WILLIAM FRYE. - - Defendants.

(Reg. Lib. 1787. A. fol. 694.)

THIS bill prayed, that, after payment and application of certain bank annuities after-mentioned, and other personal estate and effects of *Jane Collinson*, at the time of her death, in satisfaction of her debts, and funeral expences, as far as the same would extend, that the remainder of her debts might be paid out of certain copyhold estates after-mentioned, and the rents and profits thereof accrued since her death, pursuant to her will, the plaintiff submitting to account for what had been received by the said *John Willis* in his life-time, or by the plaintiff since his death, saving all just allowances; and, for that purpose, that the said states, or a competent part thereof, might be sold, and all proper parties join in the sale, and that the defects in the surrenders of the said states, if any, might be supplied, in such manner as the court should think proper, and, that the plaintiff, or such person or persons as he should appoint, or who might become purchaser of the said copyhold estates or the purposes aforesaid, might be admitted tenants to the same, on payment of the usual fines and fees, and that the money arising by such sale, together with such rents and profits as aforesaid, might be applied in payment of the remainder of the debts of the said *Jane Collinson*, and the surplus, if any, paid to the plaintiff, and that all necessary directions might be given for the purposes aforesaid. And the case made by the bill was as follows:—

A feme covert having a power, under articles of separation, to dispose of her estate: *Quæ*. Whether her surrender of the copyhold is good? (1) [Covenant by a third person to indemnify husband against wife's debts, a good consideration.] (2)

That the said *John Willis*, deceased, in *Trinity Term*, 1774, exhibited his bill in this court, on behalf of himself and the creditors of the said *Jane Collinson*, against the said *Thomas Collinson*, *Thomas Jekyll* (since deceased), and the said *Michael Collinson*, stating that in the year 1752, a marriage was celebrated [*] between the said *Michael Collinson* and *Jane Collinson*, and that articles were entered into previous thereto, for making a provision for the said *Jane*, that there was issue of the said marriage one son and one daughter, namely, the said *Charles Steynsham Collinson* and *Marian Collinson*, both then living; that, on account of some disputes which had arisen between the said *Michael Collinson* and *Jane Collinson*, they had agreed to live apart, and that by indenture of

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(1) It was determined in *C. P.*, on solemn consideration of the case, sent on this occasion, that the wife's surrender was good, without her husband's joining, and without any special custom for the purpose. *Vide* 1 Hen. Blackst. 354, &c. The point was not determined, but was compromised in *Taylor v. Philips*, 1 Ves. 229. *Vide* Supplement, 119. 258. It had, however, been decided in 1764, that such a surrender would not be good at law. *George on dem. Thornbury v. ———*, Ambler, 627. That it could be effectuated in equity, in a proper case, seems evident in analogy to the decision in the case of freehold lands in *Rippon v. Dawding*, Ambler, 565. and *Wright v. Lord Isington*, 1 Bro. P. C. 486. (8vo. edition.) *Et vide* 1 Hen. Blackst. 350. *Bramhall v. Tall*, Ambler, 467. and 2 Eden, 220. was decided on another ground, there having been a valid execution of the power by fine, which the Court would not suffer to be invalidated by the preceding invalid attempt.

(2) See p. 386. *postea*; and *Horral v. Jacob*, 3 Meriv. 256, &c.

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five parts, bearing date the 15th day of *July*, 1762, the said *Michael Collinson* and *Jane*, his wife, agreed to live separate; and the said *Michael Collinson* covenanted with the said *Thomas Collinson* and *Thomas Jekyll*, that the said *Jane Collinson* should, from thenceforth, enjoy to her own use, all such estates, real and personal, as should come to her during her coverture, or that he should become entitled to in her right; and *Charles Bannaster* (father of the said *Jane Collinson*) covenanted with the said *Michael Collinson*, to indemnify him against all such damages and expences as should be sustained by him, by means of any debts or trespasses by the said *Jane Collinson* contracted or committed, or to be contracted or committed, from the 12th of *January*, 1762.

That the said *Charles Bannaster* died 17th of *August*, 1770, having duly made and executed his last will and testament in writing, bearing date the 12th of *August*, 1769, whereby he gave all the residue of his personal estate, after payment of his debts, legacies, and funeral expences, to the said *Jane Collinson*, his daughter, and appointed her executrix; that she proved the will, and took upon herself the execution thereof; that on the death of the said *Charles Bannaster*, divers freehold and copyhold estates came to the said *Jane Collinson*, and that, in regard the personal assets of the said *Charles Bannaster*, were bound by the said covenant to indemnify the said *Michael Collinson* as aforesaid, it was agreed, that the sum of 782*l.* bank annuities of the year 1726, standing in the name of the said *Charles Bannaster*, and part of his personal estate, should be transferred into the names of the said *Thomas Collinson* and *Thomas Jekyll*, on the trusts therein-mentioned; and that the same were transferred accordingly:

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That, in consequence of the said agreement, by indenture tripartita, dated the 12th day of *December*, 1770, and made between [*] the said *Jane Collinson* of the first part, the said *Michael Collinson* of the second part, and the said *Thomas Collinson* and *Thomas Jekyll* of the third part, reciting the several matters aforesaid, it was witnessed, that it was agreed that the said 782*l.* bank annuities of the year 1726, were to be transferred to the said *Thomas Collinson* and *Thomas Jekyll*, and that they and their heirs, executors, &c. should stand possessed of the same, on the trusts therein-mentioned; and the said *Michael Collinson*, for himself, his heirs, &c. agreed with the said *Thomas Collinson* and *Thomas Jekyll*, that it should be lawful for the said *Jane Collinson*, and she was thereby empowered, by deed, or writing, or will, to dispose of all or any part of the said 782*l.* as fully as if she was single and unmarried, subject to the trusts therein declared:

That the said *Jane Collinson* died on the 1st of *September*, 1782, having made her will, dated the 5th day of *July*, 1772, whereby she gave the said 782*l.* bank annuities, subject to her debts and funeral expences, to the said *John Willis*, and appointed him sole executor; that he proved the same, and undertook the executorship, and paid divers debts of the said *Jane Collinson*: that there were some of the debts of the said *Charles Bannaster* unpaid: that *Michael Collinson* had not sustained any damage by means of any debts or trespass contracted or committed since the 12th day of *July*, 1760, and that the said original bill prayed that the said *Thomas Collinson* and *Thomas Jekyll* might be decreed to transfer to the said *John Willis*, the said 782*l.* bank annuities, with the dividends then due and to grow due thereon, and that the same, when so transferred, might be applied agreeable to the trusts of the said indenture of the 12th day of *December*, 1770, and for the purposes in the said testatrix's will directed for the benefit of the said *John Willis*, and the other creditors of the said *Charles Bannaster*, in such manner as the court should direct; and that the said *Thomas Collinson* and *Thomas Jekyll* might pay the said *John Willis* the arrears of the said bank annuities due to testatrix at her death,

death, and account with him for such part of her personal estate as had come to their hands, and pay the same accordingly :

That, by a decree made on the hearing of the said cause, on the 13th day of May, 1776, it was referred to Mr. *Pechell*, one [*] of the Masters of this court, to take an account of what was due to the creditors, if any, of the said *Jane Collinson*, with the usual directions, and it was ordered, that the defendants, *Thomas Collinson* and *Thomas Jekyll*, should transfer the said 782*l.* bank annuities, and pay the dividends arisen thereon, till such transfer, to the said *John Willis* :

That, in pursuance of the said decree, an advertisement was published, in consequence of which divers creditors came in and proved their debts :

That, before any further proceedings were had in the said cause, and about March, 1779, the said *John Willis* died, and the said suit and the proceedings therein became abated :

That, at the time of instituting the said cause, it was apprehended that the aforesaid bank annuities, with the other personal estate of the said *Jane Collinson*, would have been more than sufficient for the payment of her debts and funeral expences ; but that it had been found otherwise :

That, by the said indenture of the 15th of July, 1762, the said *Michael Collinson*, for himself, his heirs, &c. covenanted with the said *Thomas Collinson* and *Thomas Jekyll*, that he would join with the said *Jane Collinson* in levying a fine or fines, recovery or recoveries, of any real estate which might come to her during her coverture, or that he should be entitled to by virtue of his marriage, and in limiting the same to such uses as she should appoint :

That, by the said indenture of the 12th day of December, 1770, the said *Michael Collinson* for himself, &c. covenanted with the said *Thomas Collinson* and *Thomas Jekyll*, that the said *Jane Collinson*, her heirs, &c. should from thenceforth enjoy, to her own use, all other the estates, as well real as personal, of the said *Charles Bannaster*, free from all claim of him the said *Michael Collinson*, and all such other real and personal estate as should come to her during her coverture, and would, at all times, join with her in levying any fines, recoveries, or assurances of such real estates, whether freehold or copyhold, and limit the same as she should appoint :

[*] That the said *Jane Collinson* was in her life-time intitled to, and in possession of, certain copyhold lands and hereditaments, holden of the manor of *Ryegate* and *Banstead* in the county of *Surry*, which descended to her on the death of the said *Charles Bannaster* :

That she surrendered the same to the uses of her will, which was dated the 5th of July, 1772, whereby she gave all her freehold and copyhold estates, subject to her debts, legacies and funeral expences, to the use of the said *John Willis*, his heirs and assigns for ever :

That, soon after the making of the said will, by two surrenders bearing date the 14th and 15th of July, 1772, she surrendered the said copyhold premises to the use of the said *John Willis* :

That, the said *Jane Collinson*, by a codicil to her said will, dated the 26th of July, after taking notice that the said surrenders were made in trust for securing to the said *John Willis*, payment of such sums as he should advance for her or on her account, she declared that, in case the said copyhold estate should not be sold at her death, for the purpose of paying her debts, then that the said *John Willis* should stand seised thereof, charged with all such sums as should be due from her at her death, or which he should pay by her order, and the fines and fees of his being admitted, and surrendering the said estates, in trust for the sole use of the said *John Willis*, his heirs and assigns for ever :

That, soon after the death of the said *Jane Collinson*, the said *John Willis*

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Willis proved the said will and codicil, and entered into possession of the said copyhold estates, and procured himself to be admitted tenant thereof, and continued in possession and in receipt of the rents and profits to his death :

That he duly made his will, bearing date the 9th day of *September*, 1776, and, thereby, gave the said copyhold estates to the plaintiff *John Compton*, and appointed him executor ; that the said *John Willis* departed this life *March* 1779, without revoking, or altering, his said will, leaving the said *Henry Compton* his [*] heir at law, that the plaintiff proved his will, that plaintiff, by virtue of the two last-mentioned surrenders, and the will of the said *John Willis*, became intitled to the said copyhold premises, subject to the payment of such of the debts of the said *Jane Collinson* as her personal estate would not extend to pay, that he, therefore, took possession of the said copyhold estate, and has, ever since, been in possession thereof.

The questions arising upon the above case were : 1st. Whether, by reason of the said *Michael Collinson's* not joining with the said *Jane Collinson* in the said surrenders, the same were not ineffectual ; and whether any estate or interest in the said copyhold estate passed thereby : or whether, on the death of the said *Jane Collinson*, the said copyhold estates, did not descend to the said *Charles Steynsham Collinson*, her heir at law, exempt from her debts :

2dly, Whether, in case the said surrenders were ineffectual, the defect ought not to be supplied by the court, and the surrenders made good by the said *Charles Steynsham Collinson*, either as to the whole, or so much as should be necessary to be sold to pay the said debts of the said *Jane Collinson*, as her personal estate would not extend to pay :

3dly, Whether, in case the said copyhold estates were properly surrendered by the said *Jane Collinson* to the use of the said *John Willis*, the plaintiff is entitled thereto under the will of the said *John Willis*, by reason of the said copyhold estate not having been surrendered to the uses thereof, and whether the same did not descend to the said *Henry Compton* the heir of the said *John Willis* :

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4thly, Whether, in case the said *John Willis* did not surrender the said copyhold estates, to the uses of his will, the defect ought not to be supplied by the court, or if the same ought not to be supplied in favour of the plaintiff, as standing in the place of the said *John Willis*, for his benefit ; whether it ought not to be supplied in favour of the creditors of the said *Jane Collinson*, and, as to so much of the said copyhold estates as should be found necessary to be made sale of for payment of such of the [*] debts of the said *Jane Collinson* as the said bank annuities and her other personal estate will not extend to pay.

The case was argued the 20th of *June*.

Mr. *Scott* and Mr. *Stanley*, for the plaintiff. — The question is, Whether the surrender of the copyhold be good at law, and, if not, whether it ought not to be supplied here. If it had been a freehold estate, the fine of the wife would have bound the estate, though it might have been avoided by the husband ; but if the husband did not avoid it, it would be valid. Here, there was a covenant in the settlement, that the wife might dispose of her own property ; if this had been an agreement prior to, and in consideration of marriage, it would have been held good in a court of equity. She would have then been competent to have bound herself, as to those rights which the marriage gave her, against the heir of the husband. *Thornbury v. Dew*, C. B. Mich. 22 Geo. 2. *Wright v. Cadogan*, 6 Bro. Parl. Ca. 6. *Taylor v. Day*, 2 Mod. 147. In this case, there was no agreement before marriage ; but there was such an agreement as a court of equity will support and render valid. *Seeling v. Crawley*, 1 Eq. Ab. 67. *Head v. Head*, 3 Atk. 295. Gilb. Eq. R. 152.

152. And the husband had a consideration for entering into it, by the father's indemnity against the debts of the wife. A court of equity will support such a deed, as it would a deed by which the husband should covenant that the land should go as the wife should appoint.

Mr. *Mansfield* and Mr. *Hart*, for the heir at law. — No such attempt, as the present, has ever been made against an heir at law. Admitting that the court could supply the surrender, there is another difficulty as to the wife's power to make a will. Is the surrender good at law? If so, they have a legal remedy, and this bill is without foundation. But there is no colour for this. A surrender by a feme covert is void, like any other conveyance made by a feme covert. It is compared by Mr. *Scott* to a fine. It is not necessary to point out the difference. A fine is a record, and operates an estoppel; nobody can defeat it but the husband: but a surrender is merely void. As to the other part of the case, nobody ever heard of a surrender being supplied, except for a wife, children, or creditors. [*] It never was done for a devisee. The testatrix neither could surrender, or make a will, in prejudice of her heir at law. It is true, had the covenant been made before marriage, though it had rested in agreement, it would have given her a power to dispose by will. *Peacock v. Monk*, 2 Vesey, 190. *Wright v. Holford*, Cowper, 31. That was the case of a deed, executed before marriage, by a lady who was of age, and had full power to dispose. The ground upon which it was decided was, that it was an agreement made with the wife when *sui juris*. There was a great difference between that and Mrs. *Collinson's* situation; she was a married woman, who had no power whatsoever to dispose, or to bind her heir, but by fine. The difference between an agreement before, and after marriage, is very great. A woman can obtain a power of disposal, only by an agreement before marriage, when she is *sui juris*. But this is not the case of supplying a surrender. There is a surrender, and the question is whether it is good or bad. It is unquestionably bad, and could not even be supported by a custom; for a custom that a feme covert may surrender is bad. *Stevens* on the demise of *Wise v. Tyrrel*, 2 Wils. 1. (3) This case is the same with that, except that no custom is pretended.

On the 24th of June, being the seal day, Mr. Justice *Buller* gave judgment.

Mr. Justice *Buller*. — The principal question to be considered is, what was the effect of the deeds of separation?

If I were minutely to examine all the cases which have been determined on articles of separation, to arrange those of much earlier times which I think are applicable to the subject, to compare the reasons, and to extract the true principle of them, it would exhaust so much time, that I could not deliver any opinion upon this case till the next term.

The decree which I intend to pronounce does not require that deep investigation, and therefore at present I shall allude to cases rather than observe upon them.

If it be law that, after a separation with a competent allowance by way of maintenance, the husband cannot be sued for the wife's [*] debts: if the wife may be sued alone for them (4); if a second husband be liable jointly with her for debts contracted during that separation; if the articles are such a formal renunciation of marital rights, that the husband cannot seize the person of the wife, without being guilty of a

(3) That case seems much shaken, if not over-ruled, by the decision of the principal one. See 1 Hen. Blackst. 342, &c. and Supplement to Vesey, sen. 121, 122. See, however, *George* on demise *Thornbury v. —*, Ambler, 627. (above referred to.)

(4) It was settled, however, contra by *Marshall v. Rutton*, 8 T. Rep. 545., which over-ruled *Corbet v. Poelnitz*, 1 T. Rep. 5.

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breach of the peace; — if all, or any of these things be law, they will go a great way towards proving that, after such a separation, the wife shall be considered in all respects, except for the purpose of marrying again, as a feme sole. (5)

All these things have been determined, and I know no reason why these decisions should not be as religiously and as sacredly observed, as any judgment, in any time, by any set of men. I believe they are founded in good sense, and are adapted to the transactions, the understanding, the welfare and interest of mankind. Many of them have to recommend them, a circumstance ordinarily of weight in judgment. They were determined on facts apparent on the record, and writs of error might have been brought upon them: but the reasons on which they were founded were so satisfactory, not only to the parties who were most essentially interested in the event, but to the profession, that no writ of error ever has been brought. (5)

If, in more ancient times, courts of equity have decided that the wife of a man banished (6), by statute, for life, might in *all things* act as a feme sole, if, in all ages, it has been held at law, that a woman whose husband is banished, or has abjured the realm, or is transported, may act as a feme sole: if, because the husband lived in *France*, Lord Chief Justice *Holt* would intend a divorce, or hold that, on the ground of living in *France* alone, he was an alien enemy, and that the wife of an alien enemy might be charged as a feme sole; perhaps such cases may support more modern determinations.

Whether they will or not, or whether, all together, they will establish that a woman thus separated may surrender or devise a copyhold estate, are questions which must be determined in a court of law and not in a court of equity; and therefore I shall deliver no precise opinion upon them now.

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[*] But however the law may stand upon the subject, it is absolutely necessary that it should be known before this case is disposed of: for I incline to think that if the surrender and devise be not good at law, the heir shall not be compelled to surrender or make a title to more than is sufficient to satisfy the debts: for the heir has equal equity at the least with the devisee, and where the equity is equal, the law must prevail.

In the case of *Wright v. Cadogan* (7), the heir was not decreed to convey; for the legal estate was in trustees: and therefore that case does not apply, even supposing that there is no distinction between such a covenant before marriage, and a covenant made after marriage. On the consideration on which this deed is founded, I think there is no difference between the cases: for the deed made on the separation, clearly was founded on a good and valuable consideration, the husband being indemnified from all debts which the wife may contract. (8) *Fitzer v. Fitzer*, 2 Atk. 511.

The deed of 1770 seems to have no other object than to enforce and explain the deed of 1762.

Another question which has been argued is, what will be the effect of the surrender by the wife alone, admitting that the deed of separation should make no alteration as to the power and condition of the wife, with respect to her real estate, but that she should still be considered in the same light as a married woman living with her husband?

It has been said that this case is like the case of a fine levied by a married woman alone of a freehold estate.

(5) But see per Lord *Eldon* C. Just. in *Beard v. Webb*, 2 Bos. & Pull. 107, 108.

(6) See the several points much dwelt upon in the report in C.P. 1 Hen. Blackst. 337. et seq.

(7) 1 Bro. P. C. 486. octavo edition.

(8) See accordingly *Worrall v. Jacob*, 3 Merivale, 356, 370, &c. &c.

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That such a fine, if not avoided by the husband, would be good, is undoubtedly true; but there is a difference between a fine and a surrender; a fine, being matter of record, is an estoppel, and that is the reason given in the books; but a surrender is no record, nor can enure by way of estoppel: however it is to be remembered that Lord Coke says, *nullum simile quatuor pedibus currit*, and whether the argument by analogy may not have its weight is to be considered: a surrender is the only mode by which [*] copyhold estates can be conveyed. If the husband had joined in the surrender, the estate would have moved from the wife.

The case of coverture is widely different from that of infancy: an infant is disabled from binding himself, except when it is for his benefit, for want of judgment and capacity: but a woman has not less judgment after marriage than she has before. Hob. 95. 1 Ves. 305.

The reasons on which her privileges or disabilities are founded are her own interest, or the interest of her husband, or both.

She is protected from disposing of her own property, without certain solemnities, upon the supposition that she is under the coercion of her husband.

Perhaps that idea is carried full as far as the reason or truth will warrant, when it is extended to all cases whilst the wife lives with the husband, and is locally under his dominion.

That fiction has not as yet been extended to cases where the husband has renounced all controul, and where the wife, by her own desire, has a separate establishment, and lives apart and totally independent of him.

And as to any interest of the husband's, he has formally abandoned it, and does not now insist on or pretend to have any.

Besides, after the husband's covenant, this must be taken to be a surrender with his assent: by custom, such a surrender is good, as appears in *Moor*, 123.

But the question here is, whether, without any custom, such surrender be good.

That also is a legal question: it is new (9), and well deserves consideration.

Supposing the law to be in favour of the heir, the question in equity will be, whether if a woman, who has a power to call for a surrender to a trustee for such uses as she shall appoint, neglects to call for such surrender, and by that means makes a [*] defective appointment, in consequence of which the legal estate descends on her heir at law, such heir, being disinherited, shall be compelled by a court of equity to make a surrender in favour of a volunteer.

But it will be time enough to decide this, when it is settled what the law is.

Therefore let a case be made for the opinion of the Court of Common Pleas, on the question whether *John Willis* took any, and what estate, under the surrenders, will, and codicil of *Jane Collinson*. (10)

As to the husband *Michael Collinson*, let the bill be dismissed with costs, to be paid by the plaintiff, and he to be repaid them out of the estate.

And as to the defendants *Vaughan*, *Shavel*, *Thellusson*, *Cornwall*, and *Maylor*, let the bill be dismissed with costs, to be paid by the plaintiff.

For, as they were made defendants unnecessarily and by mistake, their costs must not be thrown on the estate, in case, after payment of debts, the residue shall be found to belong to the heir at law.

(9) See, however, *George on dem. Thornbury v. ———*, *Arbiter*, 627.

(10) The Court of C. P. certified that the surrender was good; and that *John W.* took an estate to him and his heirs, according to the several customs of the manor. *Vide* *Hen. Blackst.* 334. 351.

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Butler for Lord
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[*Vide* S. C.
antea, 63. et
post. 394.]

A person making a false representation through mistake, but where he might have had notice of the truth, it shall bind him. (1) Gift of a residue by will is a satisfaction for money secured to be paid by marriage articles. (2)

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(Reg. Lib. 1787. B. fol. 585. b.)

ONE of the points in this cause was fully discussed in the branch of it reported *ante*, vol. i. p. 63. The new matter, upon which it came on now, was this: *James Butler*, the elder brother of *John Butler*, was, under the same and other settlements, entitled to the estate charged with the 8000*l.* for one younger child of the marriage, subject to the life estate. The father being dead, he afterwards suffered a recovery, by which he obtained a fee-simple in the lands. In June 1773, *John Butler* applied to the plaintiff to lend him 3000*l.* on the security of the 8000*l.* portion, for which he assigned, by indenture 29th June 1773, 5000*l.* part of the said 8000*l.* as a security, and [*] also entered into a bond, in the penalty of 6000*l.* for the same. In December 1774, *John Butler* borrowed of defendant *Bennet* 2978*l.* and by an indenture reciting the above security to the plaintiff, and a bond to *Bennet*, he assigned the whole of the 8000*l.* as a collateral security. *John Butler*, afterwards, by indenture 11th March, 1775, conveyed all his estate and effects to the defendant *Rickman*.

James Butler (who was seised in fee), from the death of his father, and down to his own death, paid the interest of the 8000*l.* The plaintiff, previous to lending the money on the securities, applied, by his solicitor, Mr. Hull, to *James Butler*, informing him of *John's* application, and desired to be informed by him, whether the 8000*l.* was a subsisting charge on the estate; when *James Butler* declared that it was, and that the plaintiff might safely advance his money on the security: he also afterwards applied for, and obtained, a sum of money to pay off the 8000*l.* portion; and gave the plaintiff's solicitor notice that he would pay off the 3000*l.* at the end of six months after the notice. But *James Butler* dying soon after, the money was not paid. Upon his death, his estates descended on his two daughters, two of the defendants. But it did not appear in evidence, that the defendants, *Bennet* or *Rickman*, had ever made any such application to *James Butler*; though Mr. Hull, the plaintiff's solicitor, was also solicitor for *Bennet*.

James had possession of the settlement, and knew of the advancements of the father to *John*; but, supposing them not to affect the gift of the residue, did not reveal the same to the defendants.

Mr. Scott and Mr. Mitford now (24th of June) argued for the plaintiff, and insisted that although the provision by the will was more than the 8000*l.* the plaintiff is intitled to be paid his 3000*l.* and that *Bennet* and *Rickman* have the same claim. The provision is a provision, by settlement, of 8000*l.* for a child; but the parent, foreseeing that, in various events, he might advance that child in his life-time, provides that, in such case, it should be a satisfaction for the provision by the settlement. This is a provision for the benefit of the persons who shall take the estate,

[† The former editions being mis-paged, it becomes necessary to make the present correspond. — Editor.]

(1) See *Coppin v. Fernyhough*, *antea*, 291. 297. and the cases in note (3), *postea*. But not where a person is called upon to give an account of the circumstances of another, and gives an honest representation, although he is mistaken in his belief; he being under no obligation to make further enquiries. *Merrewether v. Shore*, 2 Cox, 124.

(2) *Vide* S. C. *antea*, 1 vol. 61. and the references, especially *Leake v. Leake*, 10 Ves. 477. 489, &c. And see *Warren v. Warren*, *antea*, 1 vol. 305., and the note and references, with regard to the case of presumed satisfaction, as between a parent and child.

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and therefore may be waved by them. *James* might relinquish [*] the benefit of it; and his conduct has been such as to shew no intent to claim that benefit. With full notice of his rights, he appointed a time when he would pay the money. If he were before the court, he could not be heard to say that he had not waved his right. By his acquiescence in the securities, he has prevented the creditors from having the benefit of a remedy against *John* in his life-time. This is a sanction given by *James* to the acts of *John*. But, with respect to the plaintiff, his case is to be supported, whatever becomes of the claims of the creditors, who are defendants. There are two points—First, Whether a general residue given by will is to be considered as a gift or advancement within the meaning of the clause? When the case of *Rickman v. Morgan* came on, that question was much agitated, and Lord Chancellor intimated a strong opinion against the then plaintiff, but did not decide it; but referred it to the Master, in order that an account might be taken of the sums advanced. We submit that the advancement ought not to be considered as a satisfaction. The question is, whether a general residue is to be taken as a gift, or advancement, for the preferment of a child? There is no case in the books where a residue has been taken as a satisfaction, though, in the cases cited in *Rickman v. Morgan*, a share in a residue has been so taken, yet a distinction has always been taken, and these have been called cases of performance. In *Devese v. Pontet* (stated by Mr. Finch, in his note subjoined to the case of *Brown v. Dawson*, Precedents in Chancery, p. 240.) there was a covenant to leave a certain sum, and the gift of a share in a residue was held a performance of the covenant, because the terms of the covenant were performed; permitting the party to take as a residue is a performance of the covenant, though the word *leave* is not in the covenant, but *give* or *advance*. It will be necessary, for the other side, to cite some case where a residue has been considered as a satisfaction. The amount of a residue of a personal estate, cannot be known in less than a year, and it is a rule, with respect to the doctrine of satisfaction, that nothing shall be considered as such, that is not equally certain and beneficial as that which is secured by the covenant; the son might be of age, and entitled instantly to the provision under the settlement: yet it would be a year before the provision made by the will could be known. But even supposing this point of satisfaction to be against the plaintiff, his case is still to be supported, as the plaintiff, knowing the proviso in favour of the [*] owner of the inheritance, applied to him for information. The answer which will be set up to this observation is, that the brother did not know of the proviso: but it is clear that he did know of it, from the deed leading the uses of recovery, which contained, not only a reference to it, but a state of the trusts, and particularly recited the proviso. He must therefore be taken, in this court, to have known of that proviso; if a party knows of a deed, it is sufficient: whether he knows of the contents of the deed or not it will bind him; as was decided in the case of *Coppin v. Fernyhough*, (*ante*, 297.), where a mortgagee was bound by that which he might have known by using due diligence. (3)

Mr. *Simcon* for *Bennet* the second mortgagee.—*Bennet*, in 1774, took a mortgage of the whole 8000*l.* subject to *Pearson's* mortgage, to secure 2958*l.* and his case stands in the same light as the plaintiff's, for the representation was made to Mr. *Hull*, who was attorney for *Bennet*, as well

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(3) Lord *Redesdale's* notes state that the following cases were cited on this point:—*Ibbotson v. Rhodes*, 2 Vern. 554.; *Draper v. Borlace*, *ibid.* 370.; *Hunsden v. Cheyney*, 2 Vern. 150.; *Moore v. Bennett*, 2 Ch. Ca. 246.; *Dunch v. Kent*, 2 Ventr. 663. and 1 Vern. 319.; and *Draper's Company v. Yardley*, 2 Vern. 662. [Vide also *Coppin v. Fernyhough*, *ante*, 291. 297.]

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as for the plaintiff. The gift, intended by the proviso, was such as could be considered as an advancement, which a gift by will never is; in order to be such, it must be a gift completed, or at least secured during the life-time; the covenant is express, it is to be a gift in preferment of the child; nothing given by a will, which is a revocable act, can be an advancement, or could be called for to go into hotch-pot.

Mr. Mansfield (for other defendants in the same interest with the plaintiff) argued to the same purpose.

Mr. Madocks, Mr. Hardinge, and Mr. Woodeson, for the material defendants the Morgans.

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The plaintiff brings his bill as a mortgagee of 3000*l.* part of the 8000*l.* the answer the trustees give is, that the term is satisfied. Two questions arise, — 1st, Whether it is a satisfied term, which depends upon the proviso, and the *quantum* John Butler took as residuary legatee. This is admitted to be more than the 8000*l.*; still they contend, on the other side, that it is not a satisfaction. We agree with them, it is not a performance of a marriage contract; but we contend that, under the rules of a court of equity, it is a satisfaction. This question depends on the effect [*] of the gift of the residue, and the intention of the testator: one thing appears that 8000*l.* was reckoned a sufficient provision for a younger child, and the proviso is that what shall be given either in the life-time or at the testator's death, shall go in satisfaction. The father, by the will, gave the only younger son the residue of his fortune. John was the younger son, and as such was entitled to the 8000*l.* upon the death of the father, and, at the same moment, he became entitled, under the will, to the residue of his personal estate. The plaintiff stands, with respect to the present suit, exactly in the same light with John. Now suppose John had filed a bill, the question would be, Whether the father had, in his life-time or at the time of his death, advanced to him a sum equivalent to 8000*l.*? The parties would then be to settle an account, and to see what John had received, or what he would be entitled to under the will, and whatever sums he had received must be imputed to him as part of the 8000*l.* The other question in the cause is a very serious one: It is how far the conduct of James shall bind his lands, after his death, and seems by the evidence of Mr. Hull to stand thus: — If James knowingly misrepresented the case to Hull, it certainly must bind him; all the cases are that the person misrepresenting is bound by his own misrepresentation; but this goes something further (*to wit*) to bind the lands. If a man is guilty of a fraud, by which the land is affected, the misrepresentation will bind the land; but if there is no fraud, the land cannot be affected. If James, therefore, gave a fair and honest answer, according to the best of his knowledge, and, at the time, there was no fraud, it was the duty of the plaintiff's solicitor to make every enquiry, he ought to have made the trustees parties to the conveyance to the plaintiff. It was great negligence, on his part, not to take a legal security; he ought to have enquired what John Butler took under the will. The present bill is a bill by the plaintiff, to be relieved against the effects of his own negligence. Here was no fraud on the part of John, he paid the interest of the 8000*l.* during his own life, and offered to pay off the principal, which fully shews his opinion on the subject, that it was a subsisting charge. The principle the court goes upon, is by acting upon the conscience of the defendant; if the defendant is acting against conscience, the court will apply a remedy; but there is, in this case, nothing against conscience: [*] we allow that James had notice of the proviso in the settlement, but he did not believe the gifts by the father to be of such a nature as to be advancements, nor did he know that the residue was more than the 8000*l.* If, then, there was no fraud, there is nothing for the court to relieve against, and the lands cannot be bound. In order to impute fraud to him, you

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you must suppose him acquainted with the sums advanced, with the *quantum* of the residue, and also with the determinations of this court, that such advancements are a satisfaction; but you never can presume fact, in order to impute fraud to the party.

Buller, J. — The case has been very well argued, on both sides; I strongly incline to think it a satisfaction: but I do not chuse to go beyond the plaintiff's claim of the 3000*l.* because Mr. *Simeon's* client would then raise a very material argument, how far the conversation with *Hull*, as the agent of *Bennet*, should be held to affect the estate of *James Buller*. The question of satisfaction is always a question of intention; I think the intention, here, is as apparent as if he had said he intended the residue as part of the sum included in the settlement. The proviso and the will must be taken together; by a gift, *at the death*, must be understood *a gift, by will*; it was to be in satisfaction, *unless the father declared otherwise*; he has made *no* declaration whatsoever. The only question is, whether the plaintiff has a right to have 3000*l.* raised for payment of his debt, out of the estate of *James*. It is argued, this is not to be done unless there is such a fraud as to affect the land, and that here was no fraud; but *James* acted innocently. It brings to my mind a case tried before me at *Guildhall*, by one merchant against another, for giving a false character of a third person, by which the plaintiff was induced to give him a credit, and lost his money; my direction to the jury was that, if one man tells another a falsehood by which he is injured, the deceived person has his remedy by an action. (4) — Those who wish to maintain the defendant's case, argue that the defendant was a total stranger to the case; which argument admits the principle, that if he was interested, the declaration would bind him. — Here, the person of whom the question was asked, certainly had an interest; fraud is a question of law, and of fact; in cases where it is a question of fact, it is always considered as a constructive fraud where the [*] party knows the truth and conceals it, and such constructive fraud always makes the party liable. I think that, here, *James Butler* knew of the proviso and advancements, and that, in this court, he was obliged to take notice of them, in fact he had express notice, it is not like the case of a latter deed referring to a former one. The enquiry was a very proper one on the part of the plaintiff, and completely repels the imputation of negligence in his agent; and the enquiry was, properly, made of the party immediately interested. *James*, at the time of the enquiry, had the equitable interest in the estate, and, upon the application, assured the plaintiff that he might safely lend his money; the enquiry was the most material the plaintiff could make. If *James Butler* admitted the term to be in existence, he must be bound by his admission; he had full notice and induced the plaintiff to lend his money, which is a fraud that will affect the defendant's estate. The term must, therefore, be held to be in force to the amount of 3000*l.* and the trustees must raise that sum (5): and the costs, except *John's* (who is equally concerned in the fraud) must be raised out of the term.

This cause, under its former name of *Rickman v. Morgan*, came on again, before the Lord Chancellor, on Thursday the 27th of November, when his Lordship decreed the gift of the residue to be a satisfaction for the sum secured by the articles. (See post. 394.)

(4) See *Haycraft v. Creasey*, 2 East. 92.

(5) And interest. R. L.

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The Earl of *Mansfield*, having resigned the Chief Justiceship of England, Sir *Lloyd Kenyon* was created a Peer, by the title of Lord *Kenyon*, Baron of *Gredington*, and appointed to that high office: and, in the vacation, *Richard Pepper Arden*, Esq. Attorney General, was appointed Master of the Rolls; *Archibald Macdonald*, Esq. Attorney General; and *John Scott*, Esq. Solicitor General: the three last received the honour of Knighthood.

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[*] MICHAELMAS TERM,

29 Geo. 3. 1788.

EDWARD Lord THURLOW, Lord High Chancellor. Sir RICHARD PEPPER ARDEN, Knight, Master of the Rolls. Sir ARCHIBALD MACDONALD, Knight, Attorney-General. Sir JOHN SCOTT, Knight, Solicitor-General.

MATTHEWS against STUBBS.

(Reg. Lib. 1788. B. fol. 4.)

One purchaser substituted for another upon motion with consent. (1)

A MOTION was made that one person might be substituted in the place of another as purchaser of a lot of an estate sold before the Master for payment of legacies (2), and an order made, on the consent of the original purchaser and all the parties in the cause.

(1) Although the Court was formerly satisfied merely with the consent of the parties and of the purchaser, a better practice was introduced by Lord Eldon C. and the Court now will not make the order upon any consent without an affidavit that there is no under bargain; considering that the new purchaser might otherwise deceive the Court, by giving the other a sum of money to stand in his place. *Rigby v. M'Namara*, 6 Ves. 515. and *Vale v. Davenport*, *ibid.* 615.

(2) The allegation, upon which the motion was grounded, was merely that the one party was agreeable to complete his purchase and the other willing to take it at the price which had been bidden. R. L.

COTHAY against SYDENHAM. [Nov. 18.]

(Reg. Lib. 1788. A. fol. 111. b.)

Q. Whether a trustee having prepared a deed of appointment under a power (but not knowing of the execution of it) shall be held to have such notice as to affect him

in respect of his payment of the money to the legatee of the person who had the power under a subsequent will. Where a feme covert disposes by will, it is necessary to produce the probate of such will to justify the payment of the money.

MR. and Mrs. *Lee* had married previous to the year 1761, and upon their marriage a settlement had been made, whereby (*inter alia*) 600*l.* due on bond to Mrs. *Lee*, was assigned to the defendant *Sydenham*, in trust to pay the interest thereof to Mrs. *Lee* during her life, for her sole and separate use, and if she died in the life-time of her husband, then to pay the principal in such manner as she by deed or will (notwithstanding her coverture) should appoint. In December 1761, Mrs. *Lee* executed a deed poll prepared by *Sydenham*, (who was an attorney)

appointing

appointing this 600*l.* among the younger children of the marriage. The money was afterwards paid in by the obligor to *Sydenham*, and by him invested in the public funds in his own name. Mrs. *Lee* died in 1773, leaving her husband surviving, and after her death a will of hers appeared, by which she gave [*] this 600*l.* to her husband absolutely — and under this will *Sydenham* paid the produce of the stock to the husband. Mr. *Lee* afterwards died insolvent, and in 1781 or 1782, the eldest of the younger children, attained her age of 21, soon after which she married the plaintiff *Cothay*, and then they, together with the infant younger children, filed their bill against *Sydenham* and the representatives of the father, claiming to be entitled to the 600*l.* under the deed of appointment, and praying payment of it accordingly. *Sydenham* by his answer insisted, that he had already paid it *bond fide* to the father under Mrs. *Lee*'s will. The only proof of notice, in *Sydenham*, of the execution of the deed of appointment by Mrs. *Lee*, was his having been employed by her to prepare a draught of such a deed, which he accordingly did, but it did not appear he had ever heard of it afterwards, nor was it in proof in the cause where this deed of appointment was found, or whether Mrs. *Lee* ever delivered it to any one, or parted with the possession of it in her life-time; but it was merely proved by the subscribing witnesses in the common form.

Mr. *Mansfield* for the plaintiffs argued, that their title under the deed of appointment was a very clear one, and that there was sufficient proof of notice in the trustee; inasmuch as a man of business who was a trustee, must be presumed to have made all due enquiries after a deed, the draught of which he prepared, before he had paid a sum of money, which was appointed by that deed, to other purposes. It was also objected, that the defendants had not produced the probate of Mrs. *Lee*'s will, which was the ground of the defence; that in a case depending on the appointment of a feme covert, by means of a will, it was necessary to produce the probate of the will, for although it was considered in this Court, only as an appointment, yet, it being a testamentary disposition, the probate was necessary to shew it to be the last testamentary disposition of the appointer.

And the Lord Chancellor thought the probate was necessary: but it being agreed between the parties that there was actually a probate made, the production of it was not insisted upon.

The cause now stood for judgment.

Lord Chancellor. — This case comes before me very bare of circumstances. — Here has been found a deed, purporting to be an [*] execution of the power in the settlement; the execution of it has been proved in the common form, and nothing more has been proved about it: I do not know whence it came, or in whose hands it has been ever since it was made, though it is proved, duly, that there was such an execution. On the other hand, I know no more of the will, than that such a one was made, and that, in consequence of this will, the money was paid by the trustee, and the question is, whether the payment of the money under this will shall affect the trustee with a misapplication of the money. It is extremely clear, that, where there is a power like this, ambulatory in its kind, if a trustee had paid under a *prima facie* title, without notice of any better title, he could not be charged again. And I have great doubt whether I can affect the trustee with notice, upon such evidence as this. If the question arose in one of those cases, in which questions of notice usually occur, that is of purchasers for good consideration, this evidence would not do. If the notice had been of a deed *actually executed*, it certainly would do; but this is not notice of a deed, but only of an intention to execute a deed: and there is no case or reasoning which goes so far as to say, that a purchaser shall be affected by notice

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of a deed in contemplation. This brings it to a question, whether a trustee shall be more easily affected than the owner of an estate. Now as to trustees, I take it, the Court expects from a trustee, that reasonable circumspection which a man, in conscience, ought to use on the occasion before him, and, to be sure, after knowing of the draught of this deed of appointment, he might reasonably have objected to paying the money without further enquiry. If he had refused, somebody must have filed a bill against him, and then the Court would have seen in some manner, whether any such deed had been executed in pursuance of that draught.—I am now going on ground untrod in principle and reasoning as well as in specie, for I know of no case in which *lata culpa* has been imputed to a trustee, on a ground quite so slender as this; I should like therefore to have some of the circumstances of this case made out, if they can be, more clearly before the Master, upon interrogatories to examine the parties as to the notice to the trustee of the deed, and of the enquiries made by him respecting it, for to be sure, the trustee might very naturally expect, that whenever such a deed was meant to have effect given to it, it would be lodged in his hands, who was the proper person to have the custody of it. [*] At the same time, I do not mean to say that if the case should come back to me, without any further lights upon it than I have at present, I should not affect the trustee. The question must turn on the notice; the plaintiff's title is certainly efficient unless the trustee can discharge himself by a *bona fide* payment of the money in his hands. This he clearly could do if he had no notice of any kind of any prior appointment.—If he had notice, he could not. I should be glad therefore to get on the record all the circumstances I can, that apply to this, before I determine this case which I consider as a new one.

His Lordship therefore directed the enquiries (1) before mentioned.

(1) The order was, that the Master should "inquire into the transactions relative to this deed of appointment of the 7th May 1761, and how and when the same was executed, and when the defendants, or either of them, heard of the execution thereof; the plaintiff and defendants to be examined on interrogatories as the Master should direct, and he was to state the result of the inquiry to the Court." R. L.

RICKMAN v. MORGAN.

(Reg. Lib. 1788. B. fol. 27. b.)

[For a statement of this case and the arguments, *vide ante* vol. 1. p. 63. *et antea*, 383, 390.]

Bequest of the residue of testator's personal estate to a younger son, being greater than the provision by the father's marriage settlement, is a satisfaction of that portion. (1)

THIS cause now came before the Court, upon the Master's report, and the question was, whether a residue bequeathed by the testator to his son, which, upon the statement of the Master's report, appeared to be considerably greater than a provision of 8000*l.* charged upon the estate under the settlement, should be deemed a satisfaction of such provision. It was argued by Mr. *Solicitor-General*, Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Mitford*, that it should not. The argument was little other than a repetition of the former.

(1) Lord *Loughborough* C. distinguishes the present case from *Farnham v. Phillips*, 2 Atk. 215. See in *Freemantle v. Bankes*, 5 Ves. 85. Likewise *Leake v. Leake*, 10 Ves. 47. 489, &c. *Bengough v. Walker*, 15 Ves. 507. Various cases on satisfaction, &c. are collected and arranged in Mr. *Swanston's* Rep. vol. i. 221, 222. note; and see the case of *Goldsmid v. Goldsmid*, to which it is annexed, *ibid.* 211, &c.

Lord Chancellor.—The question arises upon the deed of settlement, by which the estate was settled, in strict settlement, upon the name and blood of the family. The parties to the deed had it in contemplation, by raising a term, to make a provision for the younger children. The two first considerations would naturally be to secure both purposes, the continuance of the estate, in the name and blood, and the charging it to benefit the younger children, but this goes a step further, and the party here contracts to relieve this estate, in such a manner as that it shall descend free from the charges upon it, that is, if his fortune would enable him to provide otherwise for younger children, he would relieve the estate from this burthen, and would apply his pecuniary [*] fortune, towards the provision for such younger children, in such case the estate should be discharged. He retains to himself the liberty of disposing of his money and lands in his life-time, and at his death, and if he had thought fit, the charges in the settlement for the benefit of the children must have remained entire for them, had they survived, for they were according to the intention of the settlement, to have a provision at all events; but still from a motive of getting rid, if possible, of this burthen upon the estate, he particularly bargains, that he would not suffer any advancement to go otherwise amongst the children, than in satisfaction of those charges upon the estate. The father had a power of declaring to that effect, and therefore an explanation arises from the settlement itself, being an agreement among the family, that no disputes should arise upon the intention of the father, but be prevented by his express declaration that such an advancement should not go in satisfaction, his intention to that effect might be deemed clear. This proviso seems to get rid of the cases upon the head of satisfaction, which have been decided upon the head of intention, as when a man has contracted to pay to A. at his death, a certain sum, and he does an act in discharge of that obligation, many questions have arisen, how far it was his intention to exercise his benevolence, or to apply himself in discharge of the contract. In support of the argument upon the circumstances of intention, the burthen of proof must lie upon those who would discharge themselves of the obligation, because such a gift is a bounty, *primâ facie*, and cannot be turned round but by strong circumstances of a contrary intention, as in the case of a bond debt. I also lay out of the question cases of performance; they ultimately turn upon the head of intention: for if a man has done that which is apparently tantamount to what he covenanted to do, yet if he did not intend it as equivalent, or in performance, it would be idle for the Court to say that he meant it as such, therefore I have been at a great loss to make a broad and useful distinction between satisfaction and performance, because of the intention of the testator, it is consequently a performance, and if that is the very thing contracted to be done, it is a proof that the party under the obligation has done it in conformity to such obligation, and is then to be deemed a performance, because there is no doubt of it. As to *Barrett v. Beckford*, *Lee v. D'Aranda*, and *Blandy v. Whitmore*, whether these determinations are well founded or not, [*] *it would be idle for a court to decide, without considering the intention of the party, or to say that these cases exclude the idea of his intention*; for the general rule of construction was that the act was done in performance of the obligation, by which the party had bound himself. Either in *Blandy v. Whitmore*, or some of those cases, much stress has been laid upon the word leave, and the question was, whether the circumstance of the party suffering his estate to fall into the hands to which the law would give it did not come under the proper sense of the word leave, the very thing the party had contracted to do; and the same sort of argument was much used in *Lee* and *D'Aranda*, and it is sufficient to warrant me in saying, how material an

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an ingredient in such a case as this, is the intention of the testator, which is not to be denied, unless something appears in the will to shew he meant otherwise; *It must therefore proceed entirely upon the intention.* The clauses in the deed exclude both species of argument, and leave the conclusion to be drawn from them, to rest upon the intention, without any express declaration of the testator, and the whole of the argument goes to this point, whether the party who has been benefited to a greater extent under the will than he would have been under the deed, by reason of the charge upon the real estate, should still keep up that charge upon the estate, contrary to the intention of the party. Had a legacy been given to the amount of 8000*l.* but not payable till twelve months afterwards, it would still have been a satisfaction, because a specific sum. It is said the thing here to be given ought to have been a sum of money, and consequently no other thing, however valuable, as a chose in action or any thing to be reduced into possession, could be a satisfaction. It would be too idle to contend that a bond not payable at the actual moment of the testator's death, or stock to the amount of 50,000*l.* or any other large sum, should not be a satisfaction, because it could not be immediately transferred into the hands of the son. But supposing there was a residue of 100,000*l.* and 500*l.* cash, and the rest in various other articles outstanding, then the question would be, whether, in point of fact, he had advanced his son, without his taking the 8000*l.* It would be ridiculous to insist, that residue would not have been a satisfaction for the 8000*l.*; it is strange to say, that the gift of the whole residue being uncertain, shall not be a satisfaction, when a moiety of that very residue, given as a legacy, will. Shall that half be deemed a performance of the covenant, [*] but a gift of the whole shall not? A point has been made, that if this residue is a satisfaction, suppose the infant was bound to take it as an advancement, he might wait many years for it; that various difficulties might occur, before it would be ascertained: but that dilemma never can arise, for on the contrary upon an estate incumbered in the manner this is by the settlement, the first fund would be 8000*l.* charged upon the estate, and that he must have at all events,—but what then? Supposing the personal fund is afterwards got in, and the infant insists upon having that fund, then the question would be, whether he is to retain both funds, or give up the charge upon the estate so as to discharge its incumbrances, whenever the personal fund shall be found to be to that extent, it is not material to consider what would be the effect of that residue, for I consider it as a contingent legacy, given upon the event of the mother's marrying in the son's life-time, as an executory devise in favour of the younger children, and consequently in the same view as a discharge of the 8000*l.* The same reasoning applies to the gift being available, but not actually paid in, and, according to my construction of the clause, the Master's report has determined this point; the result of his enquiry being, that the sum of money acquired by the residuary bequest, is greater than the sum of 8000*l.* The clause might have been more precisely worded, so as not to have left a doubt: as it now stands, it would be too much to give costs.

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PERRY against MARSTON. [14 & 21 Nov. & 9 Dec.]

(Reg. Lib. 1788. B. fol. 123.)

[See an accurate statement of this case, 2 Cox, 295. *Et vide* Cooper, Ca. Ch. 164, &c. and the note.]

If a mortgagee admits himself to have no other title, it shall bind him, and the Court will let in the mortgagor to redeem after 30 years; not so if by his answer he claims by a better title.

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A PPEAL from a Decree of Redemption at the Rolls: (1)

The facts (2) appeared to be that a surrender was made by *Perry* the mortgagor, to *Marston* in mortgage, the reconveyance to be to such uses as *Perry* should direct, or to *Perry* himself in fee.

There was a subsequent surrender from *Perry* to the use of himself for life, remainder to his wife (*Marston's* sister) for life, remainder to *Marston* in fee, subject to the trusts of the former conveyance.

[*] Under these conveyances *Perry* enjoyed the estate without paying any interest, till the year 1751, when he died; and, after his death, *Elizabeth* his wife enjoyed in like manner during her life. In the year 1751, upon the decease of the husband, part of the premises were sold,

(1) Reg. Lib. 1784. B. fol. 694. b. It appears that in this case several witnesses proved a clear and unequivocal acknowledgment by the mortgagee, that he considered the mortgage as a subsisting one, and had his accounts ready. See a copy of the depositions, and the observations of Sir T. Plumer, V. C. on this case, in *Reeks v. Postlethwaite*, Cooper, Ch. Ca. 164, 165, &c. 170. 172. See also the principal case stated in *Whiting v. White*, 2 Cox, Rep. 295, &c. &c. S. C. Coop. Ca. Ch. 1.

(2) The facts are so inaccurately and defectively stated, that they require an exposition from Reg. Lib. From the entry under the original decree, which was pronounced in 1785 (and is in R. L. 1784. B. fol. 694, b. &c.) it appears (*inter alia*) that one *Joseph Perry*, senior, on the 5th July, 1737, surrendered the premises in question to his own use for life, remainder, to *Margaret Perry*, (*the mother of the plaintiff*), and *W. E.* their executors, &c. for a term of 1000 years, remainder to *Joseph Perry*, junior, (nephew of the said *Joseph Perry*, the surrenderer, and father to the plaintiff), his heirs and assigns for ever, subject to the payment of 50*l.* to the said *Margaret Perry*, (*the mother of the plaintiff*) within twelve months next after the death of *Joseph Perry*, senior, without interest; and also 60*l.* to the said *W. E.* within the like time, and interest, upon which payments being made the said term was to sink into the inheritance.

J. P. senior, having been accordingly admitted, he and his nephew, *Joseph Perry*, junior, (who had also been admitted,) and *Margaret*, his wife, (they being the father and mother of the plaintiff), on the 4th August, 1741, surrendered the premises to the use of *John Marston*, his heirs and assigns, for ever; "subject to the trusts mentioned in the said last-mentioned surrender," and subject to a proviso upon re-payment of 80*l.* and interest for the said *J. Marston*, to surrender the premises as *J. P.* senior, should by will or deed appoint, and in default thereof to the said *J. P.* senior, his heirs and assigns for ever. *Marston* having been admitted, *J. P.* senior, and *Elizabeth* his wife, on the 7th December, 1741, surrendered the premises to the use of *J. P.* senior, the surrender for life, remainder to *Elizabeth* for life, remainder to *J. Marston*, the mortgagee, his heirs and assigns for ever, "subject to the trusts and conditions mentioned in the last recited surrenders;" [meaning the surrender of the 5th July, 1737,] and the said *J. P.* senior, *Elizabeth* his wife, and the defendant, were accordingly admitted.

J. P. senior, died without issue, and intestate, leaving *Elizabeth* his widow, and *J. P.* junior (the plaintiff's father), his nephew and heir-at-law.

Elizabeth died in 1751, and the Bill alleged, that after her death, *J. Marston* entered into possession as mortgagee, till his death in 1765, when the defendant, his personal representative and eldest son, and heir-at-law, took possession of the premises, and kept the same, &c.

The Bill contained the usual allegations as to *J. M.* the original mortgagee, and the defendant, having kept accounts as mortgagees, and having received more than sufficient to answer what might be due on account of the mortgage monies, &c. &c. and it then prayed for a redemption, &c. in the usual manner. The answer (*inter alia*) stated, that *J. P.* senior, intermarried with *Elizabeth Marston*, widow, the mother of the deceased mortgagee, and the grandmother of the defendant; and the defendant believed, that in

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sold (3), and *Elizabeth* joined in the conveyance. She dying soon after, *Marston* took possession and held the same without any account to 1765, and from thence to 1779 no act was before the Court to show under what title the defendant held.

The bill being filed in 1776, the first answer came in 24 May, 1780, by which the defendant denied that he held as mortgagee, and claimed to hold by title under the second deed. In the same year, 1780, the conversation passed which was considered as a declaration that *Marston* held only as a mortgagee. It was a conversation between the plaintiff's son and the defendant, in which the defendant asked the plaintiff's son, why his father did not pay the money. To which he answered, because he was so poor he could not pay it; to this the reply of the defendant was, that he was ready to settle the matter without suit. An amended bill was afterwards filed, and the cause was heard at the Rolls, when, the above evidence being read, His Honor (Sir Lloyd Kenyon) said, that evidence arising after the commencement of the suit was always suspicious, but he thought this had such weight that he must decree a redemption.

Upon an appeal it came on this day before the Lord Chancellor.

Mr. Solicitor General for the appellant, urged the improbability of the evidence of the conversation which had passed with a near relative of the plaintiff's, and was under very suspicious circumstances; it might have been put in issue by the amended bill, but the plaintiff had not done so. Many acts of ownership had been exercised by the defendants for a great length of time, whilst the plaintiff had stood by; but now that the land was improved by building upon it, they had filed this bill to redeem; which, on the ground of their acquiescence, they ought not to be permitted to do.

Mr. Selwyn and Mr. Johnson for the respondents, contended on the

consideration of that marriage, the said *J. P.* agreed that the premises should afterwards be surrendered and settled to the use of *J. P.* senior for life, remainder to *Elizabeth* his wife for life, remainder to *J. M.* junior, deceased, "subject to the charges mentioned in the surrender of 1737;" for the defendant said, that in December, 1741, *J. P.* senior, and *Elizabeth* his wife, at a special manor court, surrendered the premises to the use of *J. P.* senior, for life, remainder to *Elizabeth* for life, with remainder to the said *John Marston* (the mortgagee) in fee, subject to the trusts, conditions, and agreements, specified in a surrender from the said *J. P.* and others, dated the 4th of August then last, to the use of the said *J. Marston*, deceased. But the defendant insisted, that by the trusts, conditions, and agreements in the last surrender mentioned, it was meant and intended that the said *J. Marston* should thereafter take the said premises to himself in fee absolutely, subject to the several estates for life of the said *Joseph Perry* and *Elizabeth* his wife therein, upon paying the several sums of money charged thereon by the surrender of the 5th July, 1737, and for that, at the same court, on the 7th December, 1741, said *J. P.* senior, and *Elizabeth* his wife were admitted, and the said *J. M.* was re-admitted to the premises to hold to the said *J. P.* senior, and his wife, for their respective lives, with remainder to the said *J. M.* in fee, subject as aforesaid, and that there was a fine then paid of 5*l.* 5*s.* for such admission; so that the said deceased *J. Marston*, by such last-mentioned admission, consented that the said *J. P.* and *Elizabeth* his wife should each of them have a life estate in the premises, prior to his interest therein, which they before such admission had not. The defendant also stated, that *J. M.* did not receive any monies of *J. P.* senior, or *Elizabeth* his wife, either for principal or interest of the 80*l.* mortgage monies; and that upon the death of the said *Elizabeth*, *J. Marston*, the defendant's father, entered upon the possession, and receipt of the rents, &c. as his own right and inheritance, and not as mortgagee, as the bill falsely suggested; and that he always considered the premises as his own absolute property, and had paid off the charges of 50*l.* and 60*l.* above-mentioned, with interest due thereon. He also stated that the rents, in 1741, were very small and inconsiderable, and the premises ruinous and out of repair; and that, in 1750, the said *Elizabeth*, together with the said *J. Marston*, and *Mary* his wife, for a valuable consideration, absolutely sold and surrendered to one *J. Proud* 50 square yards, or thereabouts, part of the premises; and that the said *J. Proud*, and his representatives, enjoyed the same without claim or interruption, &c. &c. And the defendant, by his further answer, insisted on the great length of time during which he and his father had been in possession, as well as all the other matters in bar to all the relief prayed by the bill. R. L.

(3) *Marston* was a party to this sale. R. L.

strength

strength of the conversation, and that the delay had been [*] occasioned by the poverty of the parties who had not wherewith to get an attorney to prosecute their claim.

Lord Chancellor.—I take it that a man taking notice by a will, or any other deliberate act, wherein he recites that he is a mortgagee (4), either of those circumstances will take the case out of the rule that a mortgagor shall not redeem after 20 years. His Lordship then recapitulated the circumstances, and said the second conveyance must have been in consequence of a new agreement, not a mode of keeping up the mortgage; as otherwise *Marston* would have got the equity of redemption for nothing, and the *Perrys* would have estates for life, subject to the mortgage money, which was more than they were worth: the words "subject to the trusts" must therefore mean "subject to the life estates of the *Perrys*." Then, if it is considered as matter of title, the rule does not apply. If *Marston* had been the surrenderer (which he ought to have been) it could not have been contended that a conversation should defeat a clear act. Then there is evidence of a clear possession in the *Perrys*; *Elizabeth* was a second wife, and mother to *Marston*. After her death the *Marstons* took the estate, and treated it as their own. The only pretence the *Perrys* make for standing by is, that they had not money to redeem, but they were more likely to redeem then than now; therefore I am of opinion that the surrender is an instrument of title; if it had only rested on the rule, I should have held that, if a party will admit that he is only a mortgagee, he is bound by such admission.

Decree reversed, and bill dismissed with costs. (5)

(4) *Ord v. Smith*, 2 Eq. Ca. Ab. 600. from select Ca. Ch. 9.

(5) It seems to appear from Reg. Lib. *ut supra*, that this decision was founded on the particular circumstances of the case, that in fact there had been an absolute surrender of the premises, which had extinguished the mortgage. See also *Whiting v. White*, 2 Cox, 290. 300, &c. and 1 Cooper, Ca. Ch. 1. *Reeks v. Postlethwaite* was of a different description. Cooper, Ca. Ch. 161.

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WILLIAMS against WHINYATES.

(Reg. Lib. 1788. B. fol. 67.)

Lincoln's Inn
Hall, 9 Dec.

THIS bill was filed by the creditors of *Thomas Whinyates* against his widow, who had, since his decease, become of unsound mind.

The testator by his will, devised to his wife all his real and personal estate, and appointed her executrix of his will, and charged all his real and personal estate with the payment of his debts.

[*] After his death, his widow, the defendant, proved his will, possessed his personal estate, entered on the real, and sold part of it, and then became insane.

The heir-at-law was in the *East Indies*.

On proof of these facts, Lord Chancellor declared the will well proved, that it ought to be established, and the trusts performed, and directed the usual accounts, and a sale of the real estate, in case the personal [estate, and the rents and profits of the real estate] should not be sufficient to pay the debts. (2)

[Estates devised away from the heir, and charged with payment of debts, ordered to be sold in aid of the personal estate, where the devisee was insane, and the heir abroad.](1)

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(1) See per Lord Redenbale, C. 1 Schoales & Lefroy, 240, 241. The reporter there seems mistaken in referring to the principal case, as the one alluded to by his Lordship. It appears here, that the heir was not entitled to the surplus, and that he had *prima facie* no title whatever, the main question here relating to the insane devisee.

(2) And in such case, and if the specialty creditors should exhaust any part of the personal estate in payment of their debts, his Lordship declared that the simple contract creditors would have a right to stand in their place and receive satisfaction *pro tanto* out of the money to arise from the sale of the real estates. B. L.

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[12th May, and
10th, 12th, 13th,
23d, 24th, 26th
Nov. 1787, and
7th, 8th, and
11th Dec. 1788.]

[See Mr. Cox's
Report of the
Judgment,
vol. ii. 320.

Hargrave,
Jurid. Arg. 453.
526. and 4 Bro.
P. C. 258.
octavo ed.]

A trustee for
the sale of
estates, for
payment of
debts, who pur-
chased them
himself, by
taking undue
advantage of
the confidence
reposed in him
by the plaintiff,
and previous to
the completion
of the contract,
sold them at a
highly advanced
price; decreed
to be a trustee
for the original
vendor as to the sums produced by such second sale. (1)

FOX *against* MACKRETH and Others.

PITT *against* MACKRETH and Others.

(Reg. Lib. 1788. A. fol. 64.)

THIS cause came on by appeal from the Rolls.

The original bill was filed in 1781, by the plaintiff, *James Fox, Esq.* against *Robert Mackreth, John Dawes, and John Baynes Garforth, Esqrs.* The supplemental bill was by *William Morton Pitt, Esq.* and *James Farrer*, trustees of the estate and effects of *James Fox*, against the same defendants, to have the benefit of the former suit.

The material part of the prayer of the original bill was, that the sale of the plaintiff's estates in the county of *Surry*, made to *Thomas Page, Esq.*, might be declared to have been made in trust for the plaintiff, and that *Mackreth* and *Dawes* might be declared to be accountable to the plaintiff for what the estates were sold for to *Page*; and also for accounts of what was due to the defendants *Mackreth* and *Dawes*, and upon what securities; and that they might be decreed to deliver up the securities, the plaintiff offering that they should be at liberty to retain, respectively, out of the purchase-monies of the estates, what should be found justly due to them from the plaintiff, and an account of monies due to the defendants, on account of annuities granted by the plaintiff to the defendants, the plaintiff offering that the defendant should be at liberty to retain the sum found due out of the said purchase monies.

[*] The circumstances of the case made against the principal

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(1) See particularly upon this case, and upon the principle in such instances, per Lord Eldon C. in *ex parte Lacey*, 6 Ves. 626, 627. *Lister v. Lister*, *ibid.* 631. *Ex parte James*, 8 Ves. 337. 345. 348, &c. 352, 353. 2 Schoales & Lefroy, 669. *Cole v. Trecothick*, 9 Ves. 246, 247, &c. *Ex parte Bennet*, 10 Ves. 385, &c. 394, &c. *Randall v. Errington*, 425, &c. In *Parkes v. White*, 11 Ves. 226. *Sanderson v. Walker*, 13 Ves. 601. *Downs v. Grazebrook*, 5 Meriv. 200. 207, 208, &c. See also *Crowe v. Ballard*, *post*, vol. iii. 117. The principle that a trustee for sale can never be permitted to retain any benefit as a purchaser of trust property "was established long before" the principal case of "*Fox v. Mackreth*," (see 9 Ves. 247., and *Whelpdale v. Cookson*, 1 Ves. 9. & supplement, 19.); but it was so distinctly recognised by this much considered and repeated decision, that the case itself has always been held a leading one. The above authorities clearly show the principle to be founded on the obvious conflict that must always exist in such instances between a trustee's duty and his interest. His duty as a vendor requires him to obtain the largest price he can obtain for the property; as a purchaser, he must desire to give the least; and the arguments from his possible and probable knowledge of various particulars unknown to others, &c. are innumerable. The principle is clearly established, and well guarded as above: but there is no positive law that a person, who is a trustee for sale, shall, in no case, be a purchaser. If he thoroughly divest himself of that character, and enter into a new, clear, and distinct contract with the *cestui que trust*, that person having the fullest information on every subject, and the sole management of the transaction, such a contract will be allowed to subsist. *Vide* in 6 Ves. 626. *Cole v. Trecothick*, 9 Ves. 334. *Morse v. Royal*, 12 Ves. 355., and the above authorities *passim*: especially 3 Meriv. 208. The parties are not bound to show that a trustee has made advantage under any such improper purchase as above; which doctrine has been attributed to Lord Loughborough in his decision of *Whickate v. Lawrence*, 3 Ves. 740. The very fact of the purchase enables them to elect, on the maturest consideration, whether they will take back the property or not, after a re-sale or otherwise. *Vide* 6 Ves. 627. *Whelpdale v. Cookson*, Supplement to Ves. sen. 19. 8 Ves. 553., and the other references *passim*.

defendants,

defendants, *Mackreth* and *Dawes*, as taken from the bill, answer, and evidence, appear to be these.

That the plaintiff *Fox*, being seised in tail of an estate at *Horsley* and elsewhere, in the county of *Surry*, subject to an estate for life, in some parts thereof, to his mother for her jointure in lieu of dower, and likewise seised or possessed of copyhold and leasehold estates in the same county, and also entitled to several other estates in expectancy or for life only, had before he came of age embarked in a very expensive course of life, and was reduced to great distresses, and, under these circumstances, had procured money by granting annuities, and engaging his friends who were of age, in bonds and judgments, for securing the payment of them, that his friends being acquainted with his situation, proposed that, as soon as might be after he should attain his age of 21 years, he should suffer a recovery of the *Surry* estate, which, or a competent part thereof, should be conveyed to trustees to be sold for the payment of his debts, and redeeming the annuities for which he, and his friends on his behalf, had engaged; that he attained his age of 21 in the month of *August* 1777, and was very soon afterwards (in the latter end of that or beginning of the next month) introduced to the defendant *Mackreth*, (who usually supplied young men of fortune with money in their distresses,) and, on account of the plaintiff's inability to make a security by mortgage, as a recovery could not be suffered till *Michaelmas* term, it was agreed, that the defendants, *Mackreth* and *Dawes*, should supply the plaintiff with the sum of 5100*l.* upon the plaintiff's granting two annuities of 500*l.* and 350*l.* each for his life. That *Dawes* on the 23d of *September* advanced the 5100*l.* for which the following securities were executed. A bond of that date by the plaintiff, in the penal sum of 6000*l.* for securing to the defendant *Dawes* an annuity of 500*l.* for the life of the plaintiff, a warrant of attorney of even date to confess judgment on the said bond, and an indenture tripartite, between the plaintiff of the 1st part, *Dawes* of the 2d part, and *Garforth* of the 3d part, whereby lands in the county of *York*, of which the plaintiff was seised for life were conveyed to *Garforth*, for securing the payment of the annuity of 500*l.* to *Dawes*. The annuity of 350*l.* was secured by a similar bond of the same date, warrant of attorney to confess judgment thereon, and a similar conveyance of the same lands to *Garforth*, [*] for better securing the same. In the annuity of 500*l.* *Mackreth*, in his answer, admitted he was interested with *Dawes*, but denied that he was so in that of 350*l.* In *Michaelmas* term 1777, a recovery was suffered of the freehold part of the *Surry* estates, by which they were vested (subject to the mother's estate for life in a part thereof) in *Oliver Farrer*, in trust to convey the same in such manner as the plaintiff should direct. Mr. *Farrer*, having agreed to act as a trustee for the purpose of selling the same and discharging the debts, together with and under the direction of two of the plaintiff's friends, (which appear to have been Lord *Ligonier* and Lord *Grantley*), if they could be prevailed upon to accept the trust. In *December*, 1777, the plaintiff being threatened with an arrest for the sum of 2000*l.* by the holder of bills of exchange drawn by the plaintiff while at *Paris*, applied to the defendant *Mackreth*, who agreed to lend the plaintiff 3000*l.* on mortgage of the *Surry* estates; upon which mortgage deeds, dated 22d and 23d of this month, were accordingly prepared and executed. At the time of the execution of these deeds, it was proposed that defendant *Mackreth* should be a trustee with *Farrer*, for payment of the debts and redeeming the annuities, when the defendant *Mackreth* proposed the defendant *Dawes* for that purpose, as being, from the course of his business, well acquainted with many of the persons who had purchased the plaintiff's other annuities, and could assist in purchasing them at a cheaper rate than Mr. *Farrer*; which was

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assented to by the plaintiff, upon an assurance that nothing should be done without Mr. *Farrer* being consulted, and approving thereof. In the same month the plaintiff delivered to the defendant *Mackreth* a particular or rental of the estate in *Surry*, made by *Thomas Jackman*, by which it appeared, that the rents of the houses, and cottages on the premises, amounted to 283*l.* 1*s.* and those of the lands to 979*l.* 14*s.* (subject to the mother's jointure, which was stated at 240*l.* a year), and the timber was valued in the rental at 4000*l.*, and the whole was valued at 45,000*l.* It was also in evidence, that *Mackreth* sent down a man, of the name of *Hampton*, to view the estate, who was there a week, but what valuation he made, or whether the same was communicated to *Mackreth*, did not appear. A trust deed was prepared by *Garforth*, reciting the mortgage, by which the estates were conveyed to *Mackreth* and *Dawes*, (subject to *Mackreth's* mortgage and the annuity to [*] *Dawes*), in trust to sell or mortgage the same, and to pay the debts and redeem the annuities granted by the plaintiff. These deeds being sent to Mr. *Farrer*, he made some objections thereto, on account of the sums advanced as the prices of the annuities not being scheduled as gross sums carrying interest at 5 per cent., and also on account of the trustees being empowered to sell or mortgage the estates without the intervention of Mr. *Fox*. And it being afterwards agreed, that *Mackreth* should pay off *Dawes*, and advance some further sums, a deed poll was prepared, calculated for execution on the 16th *January* 1778, and endorsed on the mortgage deed, to secure such further sum of 7000*l.* (consisting of 5100*l.* the consideration money for the annuities granted by the plaintiff to *Dawes*, with 212*l.* 10*s.* interest thereon, for the quarter's arrear due 23d *December* 1777, (but which was not paid by *Mackreth* to *Dawes* until 16th *July* 1778) and 51*l.* 14*s.* 9½*d.* 23 days' arrear of the said annuities from 23d *December* to said 16th *January*, and 1635*l.* 15*s.* 2½*d.* paid to the plaintiff on that 16th *January* 1778, a new trust deed was also prepared, in which this deed poll was recited, and the 3000*l.* and 7000*l.* made the first charges on the estates. On the 16th *January* 1778, the plaintiff *Fox* and the defendant *Mackreth* dined together at the house of the defendant *Garforth*, for the purpose of executing these deeds, and, after dinner, and before the plaintiff had executed the deeds, a conversation arose, in which it was proposed that the defendant *Mackreth* should become the purchaser of the estate, and *Jackman's* valuation of 45,000*l.* was mentioned by the plaintiff as a fair price, which was objected to by *Mackreth*, considering the value put thereby upon the houses and lands; upon which the defendant made a calculation of the houses at fourteen years' purchase, and the lands at thirty, together with the household furniture, valued at 500*l.* and the timber at 4000*l.* (on which last two articles they agreed) amounting to 37,853*l.* 14*s.*; the plaintiff afterwards offered to sell the estates to the defendant for forty-two thousand pounds, upon which the defendant said, he would split the difference, and give 39,500*l.* for the same, but would not give more, and the plaintiff not agreeing to accept the terms, the trust deeds were then executed by the plaintiff. After the deeds were executed the conversation was renewed, and the plaintiff expressing some concern with respect to his mother's jointure, in case he should accept [*] the defendant's terms, the defendant offered the 39,500*l.* and to subject himself to the payment of the plaintiff's mother's jointure, in case she should survive him; upon which the parties agreed, and the defendant *Garforth* (who had been absent during the greatest part of the treaty) was called in, and drew up a memorandum of such agreement, by which the money was to be paid on or before the 25th of *March* next, till which time the plaintiff was to receive the rents and profits, and then convey the estate to the plaintiff, and about 12 o'clock at night, this memorandum was signed

signed by the plaintiff, upon which the trust deed was cancelled. On the 28th of the same month, articles for the purchase were executed by both parties. On the 24th *April* following, the plaintiff, and *Anna Fox*, his mother, on the 2d of *May*, executed conveyances of the estates to the defendant, in consideration of 39,500*l.*; 11,097*l.* of which was retained by the defendant, in payment of the above mortgage of 3000*l.* the 7000*l.* secured by the deed poll, and some other sums charged by the defendant, as advanced to the plaintiff, and the defendant gave the plaintiff, as a security for the residue, being 28,408*l.* a common accountable receipt; and afterwards, on the objection of the plaintiff to this as the only security for the money, the defendant wrote on the same piece of paper, which contained the said accountable receipt, the following charge: "25th *April* 1773, I do hereby charge all my estates in the county of *Surry* with the payment of the above sum of 28,403*l.* and interest." At the time of signing the above, the defendant had no estates in the county of *Surry*, but those purchased by him of the plaintiff. And the defendant gave to the plaintiff no other security for the residue of the money than the receipt and charge. In the interval between the execution of the articles and that of the conveyances, *Mackreth* had treated with *Thomas Page*, Esq. for the sale of the whole of the said estate, and on the 21st *March*, Mr. *Page* agreed to give 50,500*l.* for the same, but no article was entered into between him and the defendant till the 30th *April* following, immediately after, *Page* was let into possession, and was to receive the rents and profits from *Lady-day* then last. The treaty with *Page*, was totally unknown to the plaintiff, when he executed the conveyance to the defendant. The plaintiff drew upon the defendant for several sums, on account of the purchase money, and in *October* 1778, having sent for an account, the defendant drew one out by which he made a balance remaining in his [*] hands of 773*l.* 18*s.* 9*d.*, but admitted in his answer that he had therein charged monies unpaid, as the supposed amount of two annuities and the arrears thereof then unredeemed, and that afterwards, in *May* 1781, having then settled the said annuities, he sent the plaintiff another account, in which he made the balance 616*l.* 17*s.* above the other balance of 773*l.* 18*s.* 9*d.* In *June* 1779 the plaintiff being again in distress, applied to the defendant, when he advanced him 2100*l.* upon an annuity of 350*l.* a-year, for plaintiff's life, secured by a bond, in the penal sum of 4200*l.* and warrant of attorney to enter up judgment on the same.

Upon discovery of the sale to *Page*, under the circumstances as stated above, the plaintiff filed his bill, insisting that the defendant *Mackreth* being a trustee for him under the trust deed for payment of debts, it was his duty to sell the same for the advantage of the plaintiff; and if he purchased for himself (which the plaintiff was advised he could not), it should be for a fair and adequate consideration; that the plaintiff having been imposed upon, ought to have the benefit of the sale; and that the sum of 7000*l.* mentioned in the articles as due to *Mackreth*, on mortgage, or the part thereof estimated to be due to the defendant as the value of the annuities granted to *Dawes*, was a much greater sum than they were really worth on a fair valuation; that no greater allowance ought to be made out of the purchase money than the sums really advanced, with interest from the time of advancing the same; that *Mackreth* had not discharged the annuities granted by the plaintiff, but the plaintiff continued liable to the same; and that at the time he granted the last annuity of 350*l.* there was money in the defendant's hands, or the defendant was accountable to the plaintiff for larger sums, as he then had in his hands the sums for which he sold the plaintiff's estate, beyond the sum of 39,500*l.* and therefore prayed as is before stated.

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The defendant, *Mackreth*, by his answer, insisted on the fairness of the transaction; and that the price at which he bought the estate was an adequate price, though he expected to have some benefit by selling it out in parcels, but that the purchaser, *Mr. Page*, having an estate in the neighbourhood, gave a larger price than it was worth to other persons. He admitted that he [*] had in his hands a balance of 617*l.* 13*s.* of the purchase money, which he claimed to retain on account of the plaintiff being only tenant for life in a small part of the estate conveyed to the defendant, and 773*l.* 18*s.* 9*d.* the balance of the accounts sent to the plaintiff in *October* 1778; and further said, that on the 30th *August* 1779, part of the estate being discovered to be copyhold, the defendant applied to the plaintiff to execute a letter of attorney, to surrender such copyhold premises to the defendant, which he readily agreed to, and signed such letter of attorney; and that *Mr. Page*, the purchaser, in *November* 1779, having raised a sum of money by mortgage of part of the said estates, and afterwards having occasion to raise money by mortgage of other parts of the said estates, and the solicitor for the person advancing the money requiring to have the original deeds of the 22d and 23d *December* 1777, and the conveyance from the plaintiff to the defendant, or duplicates thereof, the defendant applied to the plaintiff to execute other parts of the deeds, which he agreed to, and, together with his mother, executed the same without expressing himself dissatisfied with the purchase made by the defendant, (but it was in evidence that *Mr. Farrer* only consented to the plaintiff's executing the same, under a proviso that the same should not be considered as a confirmation,) which acts of the plaintiff the defendant insisted would operate as confirmations of the transactions.

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The cause was heard at the Rolls, before his Honor the then Master of the Rolls, on the 26th, 27th, and 29th of *June*, and on the [4th,] 13th, 14th, and 26th of *July* 1786, on which last day his Honor was pleased to make his decree, whereby he declared that undue advantage was taken by the defendant, *Mackreth*, of the confidence reposed in him by the plaintiff, *Fox*, and that therefore the defendant, *Mackreth*, ought to be considered as a trustee as to all the estates and interests comprised in the conveyance of the 23d and 24th days of *April*, 1778, for the said plaintiff *Fox*, after the execution of the said deeds; and ordered it to be referred to the Master to take an account of the money received by the defendant, *Mackreth*, from *Page*, and to compute interest thereon at 5*l.* per cent. from the time of receiving the same, and to take an account of the money paid by defendant, *Mackreth*, to *Dawes*, on account of the annuities of 500*l.* and 300*l.* and also an account of the money advanced by *Mackreth*, [*] on account of the annuity of 350*l.* in 1779 (2), and an account of money advanced or paid by *Mackreth*, on account of the mortgage in 1778, and under the contract for the purchase of the estate (3), and compute interest on the same, and that the defendant *Mackreth* should pay the plaintiff the costs of the suit, so far as respected his insisting on the conveyance of the 23d and 24th *April* 1778, as a conveyance for his own benefit, and granted an injunction against the defendant *Mackreth*, to restrain him from proceeding at law, touching any matter in question in the cause, and reserved further consideration.

From this decree there was an appeal by the defendant, *Mackreth*, only, to the Lord Chancellor, which came on to be heard in *Michaelmas* term 1787, when *Mr. Mansfield*, *Mr. Scott*, *Mr. Lloyd*, *Mr. Campbell*,

(2) " And the particular times when, and in what manner, such sums were advanced."
 R. L.

(3) " Or the conveyance thereof, and to state the particular times when, and to whom such sums were paid, and the account in which the same were included respectively."
 R. L.

and

and Mr. *Mitford*, were heard for the respondents, in support of his Honor's decree.

His Honor declared as the foundation of his decree, that an undue advantage had been taken of the confidence placed in *Mackreth* by *Fox*, and upon that ground directed the proper accounts to be taken. In that decree *Dawes* and *Garforth* have acquiesced; *Mackreth*, the principal defendant, only, disputes the justice of it; nor is it to be wondered at that he does so, for whilst the decree stands in force, his character stands materially affected; the parties on the other side are anxious to maintain the decree, not merely on account of the largeness of the property, but as an useful precedent. (The counsel enumerated the facts of the case as before stated.) Upon the facts as stated, his Honor thought *Mackreth* had abused the confidence reposed in him by *Fox*, and ought, with respect to the purchase, to be considered as a trustee for him, and that *Fox* ought to have the advantage of the transaction with *Page*. The circumstances are certainly such as to show an implicit confidence placed by *Fox* in *Mackreth* and *Garforth*, who appears to have been attorney for *Mackreth*. Wherever the transaction would bear the light, the deeds were sent to *Farrer*, the plaintiff's trustee, where it would not, it was kept a profound secret from him, although *Mackreth* had promised that nothing should be done without the latter being consulted. That *Garforth* was the agent of *Mackreth*, not of *Fox*, is apparent; he was privy to the whole transaction with *Page*. If he was the agent of *Fox*, he should have given him [*] notice of that transaction, if he was not, the utmost confidence is given to *Mackreth*: *Fox* takes his word in every thing: he gives up to his opinion *Jackman's* valuation and his own judgment; and at 12 o'clock at night sells him the estates at his own price, which was 10,000*l.* below *Jackman's* valuation. So with respect to the furniture, it is sold at *Mackreth's* valuation, though it included 500*l.* worth, added by *Fox* himself, to the furniture left by Lord *Bingley*. *Mackreth* through the transaction affected to be the friend of *Fox*, and by his conversation with *Farrer* admitted himself to be a trustee for *Fox*: for that conversation cannot be explained, by *Mackreth's* being to have the purchase money to pay debts, as that agreement did not subsist at the time; the agreement at that time only being that the purchase money should pay the debts charged on the estate. Enough has been stated to show that *Fox* was in the situation to be the object of fraud, that a trust was reposed in *Mackreth*, and that fraud has been practised upon him, and, therefore, sufficient to maintain the declaration in the decree. — But it has been, and will be again, endeavoured to protect *Mackreth*, by arguing that the case does not fall under any of the heads of fraud. To this it has been answered by his Honor, that it was such a transaction as could not be maintained, but that it did fall within the cases of young men having estates in possession and in reversion, and dealing with a man of business, and of advantage taken of his distress, except that this case had the pre-eminence, as being a case where confidence had been so much abused. It was also argued, that inadequacy of price was not a ground for setting aside the bargain, though it has been frequently decided, that where the inadequacy is very great, that has been a ground for rescinding the transaction, *Chesterfield v. Janssen*, 1 Atk. 301. 2 Vez. 125.: the real value of the estate here was 50,500*l.*, and it is sold at 39,000*l.*, the inadequacy therefore proves the abuse of confidence; and though it is undoubtedly true that every contract improvidently made shall not be rescinded, yet a contract grossly inadequate, and founded in breach of confidence, will surely be set aside, though the court cannot affect the strict rule of morality, and can only enforce what Mr. *Madocks* called a technical morality, yet in the case of a trustee, or a person standing in a situation of which he can avail himself, the court will not suffer him to derive advantage from that circumstance.

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stance. Here every art was used to impress *Fox* with the idea that *Mackreth* [*] and *Garforth* were his friends, though the transactions with respect to the annuities show them very much otherwise; *Mackreth* certainly derived an advantage from his situation, *Fox* never was out of his debt; to deal with him at all was a fraud on the part of *Mackreth*, *Osmond v. Fitzroy*, 3 Wms. 129.; there was nothing like the confidence or the abuse of the confidence, in *Gwynne v. Heaton*, (*ante*, vol. 1. p. 1.) that there is in the present case, yet there the transaction was set aside. — Then the confidence reposed in *Mackreth* is made use of to induce a confidence in *Garforth*. The same person being employed on both sides, has been considered in the case of *Sir P. Jennings Clerke, v. Smith*, at the Rolls, lately, as a sufficient badge of fraud to set aside a transaction. There *Sir Philip had bought* (4) an annuity of *Smith*: the same person was concerned as attorney on both sides, and had not taken proper care of the security, his Honor thought that a sufficient ground on which to direct an enquiry. — Then, with respect to the confirmations, none of the facts come within the cases which have been held to be confirmations; in order to be such, they must amount to a release of action: the reason given in *Chesterfield v. Janssen*, for holding it a confirmation was, that *Spencer* knew all the transaction, and that he was entitled to set it aside. In the present case, the suffering the duplicates to be made of the deeds is a mark of confidence, but by no means amounts to a confirmation, as it was done without any knowledge in *Fox* that he could impeach the transaction. *Baugh v. Price*, 1 Wils. 320., was a case where all the acts were repeated, yet held no confirmation, *Taylor v. Rochford*, 2 Bro. Parl. Cases, 281. No act can be a confirmation of a preceding contract, but what is done with full knowledge of that contract, *Cole v. Gibson*, 1 Vez. 503.

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Mr. Ambler, Mr. Madocks, Mr. Selwyn, Mr. Ainge, and Mr. Hargrave, for the defendant and appellant *Mackreth*. — The Master of the Rolls has decreed eleven thousand pounds to be paid by *Mackreth* to *Fox*, we shall submit to the court that his Honor has gone, in making the decree, further than from any of the cases, or from the reason of the thing he ought to have done. It will be necessary in order to show this, to state the progress of the cause; the first bill was filed in the name of *Fox*, in June 1781, three years after the purchase by *Mackreth*; another bill was filed in February 1782. In March a motion [*] was made for an injunction to restrain *Mackreth* from proceeding on the annuity bond, *Mackreth's* answer was read against that application, and your Lordship was of opinion, that there should be no injunction (5), there being no surprise

† *Mr. Selwyn* read, as part of his speech, a note of what Lord Chancellor said on discharging the order for the injunction (5), to the following purpose:

Lord Chancellor. It is impossible to observe, that one-fifth more has been paid for the estate, and not to wish that the first owner should have the advantage. I have tried on the head of every one observation, whether I could decree that *Mackreth* should be a trustee for *Fox*, for the difference of value in the estate. I attended with great care, to see whether I could find any surprise on *Mr. Fox*, but the whole case begins and ends with the circumstance of an advantage being made in point of price. If *Mackreth* had sold the estate to *A.* (being a trustee for *Mackreth*) the case could not have stood; but *Mackreth* lost the character of a trustee when he became a purchaser of the estate. (5) The rental was extended into particulars, for the purpose of calculating the true value of the estate. It is not argued that the rental was unfair. *Jackman's* calculation was pressed by *Fox* upon *Mackreth*; deliberation was had, and the difference split between

(4) Lord Redesdale's notes state this part to be inaccurate.

(5) Lord Eldon, C. said, "He had there Lord Thurlow's own authority for saying "that his Lordship went upon a clear mistake in dissolving the injunction." *Fide* 6 Ves. 637, 638.

surprise upon *Fox*, nor any fraud imputable to *Mackreth*. Then for the purpose of introducing creditors into the cause, in May 1782, an assignment is made by *Fox* of his estates, to four trustees, Mr. Pitt, Mr. Hoare, Mr. Oliver, and Mr. James Farrer, in trust, to pay debts. In 1784, Mr. O. Farrer releases himself, and in June in the same year, a bill is filed by the three trustees, to have the benefit of the suit begun by *Fox*; this artifice was used in order to have the advantage of the plaintiffs appearing as creditors.—The cause came on to be heard in the same manner as if brought by *Fox*.—The decree is wrong both in the declaration and in the direction. We contend, 1st, that there was no confidence reposed by *Fox* in *Mackreth*. 2dly, Whether there was a confidence reposed or not, there was no abuse of it. 3dly, That neither the declaration, facts, or circumstances support the directions. With respect to the first head, there is no circumstance by which a confidence can be shown to have been reposed in *Mackreth*. He was only a trustee as to the 28,000*l.* balance, to apply it in the payment of debts, for which sum he has accounted; certainly every trust implies a confidence, but not such a confidence as is meant in the decree, as a trust to be abused. If the trustee does not perform his trust, it is a breach of trust, [*] not an undue advantage of his situation.—Where a person treats with another without the power of enquiring into the value, and makes an improper bargain, that is taking an undue advantage; but that is not the case of a trust. The declaration is, that *Mackreth* has taken an undue advantage of his situation, and therefore is to be considered as a trustee for the plaintiff, this could refer only to the purchase, not to the loan or the annuity, and these cannot be said to be transactions of confidence: farther, can the purchase be so considered? Two persons are dealing for an estate, Mr. *Fox* wants an extravagant price, Mr. *Mackreth* wants to purchase at a reasonable one: both argued as to the value. *Fox* had a valuation as well as *Mackreth*, and a fair price was given. If so, the declaration cannot be right. 2. The bill is filed to attack every transaction between the parties, and to make the whole appear as one system of fraud, yet if they can succeed in the point of the purchase, it is all they want: the other circumstances are thrown in to give weight to the main point, that *Mackreth* shall account for 11,000*l.* received from *Page*, that is, for 6000*l.* more than *Jackman's* valuation. The true question is, whether *Mackreth* is a fair purchaser of the estate at 39,000*l.* There is no pretence that he ever refused to let the annuities be redeemed: two of them in fact were redeemed, nor is there any ground to quarrel with the loan. *Mackreth* had no dealings with Mr. *Fox* during his minority, he did not even know him at that time. The first application to *Mackreth* was from *Garforth*, to buy an annuity; *Garforth* was connected with *Fox*, for the purpose of borrowing money. If none of the articles themselves are sufficient to impeach *Mackreth*, being taken together, they will not do so. As to the annuities, *Fox* sought *Mackreth*. In December 1777 he granted him two annuities amounting to 800*l.* a-year; part of the 500*l.* a-year annuity was the property of *Mackreth*, but the annuity was taken in the name of *Dawes*, and was at six years' purchase. *Fox*

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them. A slight memorandum was made by Mr. *Garforth*, who acted as agent for *Fox*; this memorandum was laid before Mr. *Burton*, at the bar. It is not on the 28th January, that the agreement is signed by *Fox*, but it is a deliberate act by *Fox*, at the distance of 12 days. The whole impeachment of the transaction, which is now opened, is upon the difference of price. (5) It does not appear to me that, at the time of the purchase, a greater price could have been produced in the common course of business of sale of estates. (6)

(6) This is not the true principle. See the preceding note, and the references in note 1) *ante*.

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had been of age a month before *Mackreth* knew of his intention to suffer a recovery in the ensuing *Michaelmas* term. It is said, *Mackreth* knowing this should not have entered into this contract, but there is no reason why he should not. *Fox* had at that time only a life estate, and could make no security but a grant of an annuity. Six years' purchase was then allowed of, as the common price. In a case of *Floyer v. Sherrard*, before Lord *Hardwicke*, *Hil.* 1740 (7), *Floyer* had bought of *Sherrard* [*] an annuity at six years' purchase, secured upon money in the funds, in the names of trustees. He filed his bill against the trustees, to pay the annuity; the objection was, that *Sherrard* was a man in distress, and that only six years' purchase was given for the annuity. Lord *Hardwicke* said, this case differed from that of young heirs, because Sir *B. Sherrard* was in possession of the estate. A sale of an annuity not redeemable was not an usurious transaction, where they are made redeemable, the court has thought it an evasion of the law. As to the price of an annuity, it is the most uncertain thing in the world; taking it upon the highest calculation, it is only one year's purchase under the value, and the court will not set it aside on that account. Then as to the security, if he had taken it on the estate it would have been good: it was done on bond and judgment, without insurance of the life. Every hardship which occurs in this case is such as must occur in every case of the kind; then this annuity was not redeemable. Lord *Hardwicke's* opinion on this subject appears to have been, that a redeemable annuity is usurious. †

Lord *Chancellor*. — I do not believe that has ever been decided: it is certainly a ground to suspect a shift; but there is no decided case, that the annuity being redeemable, will make the transaction usurious.

Counsel for the defendant. — With respect to consulting *Farrer*, that was not *Mackreth's* business, if *Fox* did not chuse so to do. If it was any body's business to advise *Fox* it was rather *Farrer's* than *Mackreth's*. The next transaction is, the recovery suffered in *Michaelmas* 1777, the legal estate was by it vested in *Farrer*, to protect it against the annuitants and creditors. He was mistaken with respect to this matter, for a judgment creditor could have taken out execution against the estate of the *cestui que trust*, the same as if it was a legal estate. As to the application for the loan of first 2000*l.* then 3000*l.* what ground is there to quarrel with that? In that transaction *Farrer* was consulted, he was present at the execution of the mortgage deed, and proves the payment of the money. Two objections are made to it, 1st, that *Mackreth* took the legal estate [*] out of *Farrer*; but *Farrer* thought it right that *Mackreth* should have the legal estate. 2d, the other objection is, that it was part of the system, and having the legal estate would assist them in carrying it into execution; but, if it was wrong, *Farrer* ought not to have parted with the legal estate; no objection was made to *Mackreth's* being mortgagee in fee. Again it is objected that *Mackreth* did not then turn the annuity into a debt, but *Fox* wanted the 3000*l.* immediately, and it might not occur to *Mackreth* to turn the annuity into a debt. The next matter is the transaction with respect to the trust. *Mackreth* did not propose himself; this was proved by *Farrer*, who says it was proposed either by himself or *Fox*. *Mackreth* says in his answer, that he did not propose himself; *Farrer* declined being a trustee, and then *Mackreth* proposed *Dawes*, as being acquainted with annuity business;

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† Subsequent opinions have certainly been otherwise. *Vide* Lord *Irvine v. Child*, *ante*, vol. i. p. 92. Lord *Portmore v. Morris*, *ante*, p. 219.

Farrer approved of *Dames*, and *Garforth* took his instructions from *Farrer*. A copy of the particular was delivered to *Mackreth*. On the 6th of January 1778, the draft of the conveyance was sent to *Farrer*, who returned it on the 7th, with this observation, that it was not as he expected, for the annuities were carried down to the time of the sale, whereas they were to be turned into loans, and that *Mackreth* and *Dames* were to have the whole authority to sell without any consent of *Fox*. There had only been a conversation in which it had been proposed to turn the annuities into a loan. Then, as to the sale itself, on the 16th of January, *Fox* and *Mackreth* treat on the subject, *Mackreth* offered 37,000*l.* at last 39,000*l.* including the furniture, and securing Mrs. *Fox*'s (the mother's) jointure. This agreement was put into writing by *Garforth*; no objection is made to the form of the writing. On the 28th January the contract was signed by *Fox* and *Mackreth*. The conveyance was laid before *Farrer*, and executed 24th April, so that it was incomplete from January to April. The objection now taken and relied upon, is that *Mackreth* was a trustee, and therefore could not contract for the purchase of the estate; but we deny that he was a trustee, and even though he were so, he might purchase upon fair terms. They contend on the other side, that the trust deed was executed, and *Mackreth* bound not to contract with his *cestui que trust*. It is true it was executed by *Fox*; for during the conversation about the purchase, *Fox* not agreeing to sell at the price then offered by *Mackreth*, executed the trust [*] deed, but continued the conversation relative to the purchase, the trust deed lying all the while upon the table. If the conversation had ceased, the deed would have had effect; as it was, it was a nullity; then how can it operate as a trust? It was a trust intended, if they will, commenced, but in the same moment put an end to, never acted under, but broke off immediately. But even supposing him to be a trustee, he might contract for the estate, so that he did but deal fairly. We admit that a trustee cannot purchase for his own benefit. If, as a trustee, he had conveyed to a third person as a trustee for himself, that would be void, but there is no case which has decided that the *cestui que trust* cannot sell to his trustee. On the contrary, it was done in the case of *Clarke* and *Swaile*, before Lord Northington (8), where Sir Samuel Clarke, by the advice of *Swaile*, conveyed the estate in question to him to sell for payment of debts; *Swaile* endeavoured to sell the estate but could not meet with a purchaser. *Swaile* afterwards treated for and purchased the estate, which was conveyed to him, at a fair price, and the money was applied in payment of Sir Samuel Clarke's debts. Another deed was afterwards executed on account of a variance in the description of the estate, and a third, occasioned by a variance of the boundaries. This last was executed by Sir Samuel Clarke and Robert his brother. Sir Samuel died, and Robert (now Sir Robert) filed his bill on the ground of a confidence being placed by Sir Samuel in *Swaile*, as his attorney, and that his circumstances were such that he durst not quarrel with him. Lord Northington said, as to the *cestui que trust* dealing with the trustee he did not much like it; but, upon the whole, he did not see any principle on which he could set the transaction aside. In the present case there is no species of fraud, it is not even attempted to be stated in the bill; but they argue, that from the case itself, there is an implied fraud, the parties met for a very different purpose, there is no colour to say it was to draw *Fox* into a sale at an under-value. In *Floyer v. Sherrard*, Lord Hardwicke relied on there being no proposal coming from *Floyer*. Then as to the argument, that *Fox* was in distress, he was upon the eve of extricating

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(8) 2 Eden. Ca. Lord North. 134.

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himself from any distress he might have been in; he was of age, and there is nothing to prove any weakness of mind, or incapacity of any kind; he was perfectly competent to act. He asked 45,000*l.*, and for that purpose produced *Jackman's* valuation. *Mackreth* [*] objected that it was 35 years' purchase for houses and land, which was a monstrous price, and offered 14 years' purchase for the cottages, and 30 for the land, amounting to 37,000*l.* He afterwards advanced to 39,000*l.* *Fox* then insisted on 42,000*l.* *Fox* had a particular, it is said *Mackreth* had a valuation, but not a word of that is in proof. *Farrer* not being present at the final agreement, is the next head of objection. But if Mr. *Fox* did not choose to have him present, it could not be incumbent on *Mackreth* to send for him; besides, the draft of the conveyance was sent to him, and if the price was not adequate to the value, or there was any thing wrong in the contract, *Farrer* should have objected to it, and have advised *Fox* not to proceed; on the contrary, it appears by his letter of the 7th April 1788, that he approved of the conveyance, except that he objected, in some respects, to the mode, and to the money remaining in the hands of *Mackreth* for payment of *Fox's* debts; but to the purchase itself, *Farrer* never objected. With respect to the money remaining in *Mackreth's* hands, that does not go to the merits of the case, though the gentlemen on the other side have treated it as a badge of fraud, *Mackreth* accounted for the application of every shilling of the money, with interest, for the time it remained in his hands. We have no objection to an account being decreed, with respect to the application of the money. Then with respect to the confirmations, they are very strong; we do not dispute the principle, that, whilst the distress continues, subsequent acts shall not be held to be confirmations. It appearing upon the sale to *Page*, that part of the estate which had been sold as freehold really was copyhold, *Fox* on the 19th of August 1779 executed a warrant of attorney to surrender the same. This was not clandestinely, but openly applied for; it was a conveyance of a part of the estate which was not conveyed before. He afterwards executed duplicates of the deeds; the purchasers from *Page* in parcels wishing to have original deeds, *Farrer* made no objection, if they would endorse upon the deeds that they were duplicates.

Lord Chancellor. — He expressly stipulated that the execution of these deeds should not be a confirmation.

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Counsel for the defendant. — The real cause of the suit is, that Mr. *Page* has given 50,000*l.* for the estate. Mr. *Fox* rested [*] under the sale, till 1781, when that sale was discovered, but an advanced price being afterwards obtained, is no reason for setting aside a previous fair sale of lands; to assert that it is, would be too much where there is no fraud. The price of 50,000*l.* paid by *Page*, was, in fact, a *pretium affectionis*; it was 6000*l.* more than *Jackman* had valued it at, or *Fox* ever thought of getting for it. Having shown, then, that *Mackreth* was no trustee, and that the separate acts are fair, there can be no fraud in them taken collectively, yet the argument *juncta juvant* is relied on in this case. There is only one case in which that argument has prevailed: indeed it is only fit to have a popular effect, not to be used in a court of justice; it only applies to a case made use of in circumstances which all terminate in one point, and which cannot be accounted for any other way. It is said the circumstances in this case are all linked in one chain, that they all tended to the making an unreasonable purchase, but the other side have not been able to connect them; the treaty for the annuities and the purchase are separate and unconnected; therefore it is to be hoped that the arguments used (*vis.*) that though the separate articles were not sufficient to set aside the transaction, yet that altogether they are sufficient, will meet the same fate here that it did in parliament,

in the case alluded † to, and that this court will reverse the attainder, and restore Mr. *Mackreth* in blood.

Mr. *Mansfield* in reply. — It is not to be denied that the large price at which the estate has been sold to Mr. *Page* is the cause of the present suit. It is that advance of price which affords the strongest evidence of the purchase by *Mackreth* being fraudulent. *Mackreth* and *Garforth* are, to many intents, one and the same. The decree against *Mackreth* is, that he shall deliver up all papers which are in his hands. The present case contains fewer contested facts than generally occur in similar matters; and the remedy which lies with the court is a very evident one. It has been argued that the court cannot enforce an absolute, but only a technical morality: I know of no such term as *technical morality* that has ever been applied in this or any other case; but where one person has obtained an unfair advantage over another, the province of a court of equity is to give the latter redress. Lord *Coke* in his 1 *Institute*, has very shortly defined the office [*] of this court to extend to cases of “covin, accident, and all deceit for which there is no remedy in a court of law.” What then is the true question in the present case? The Master of the Rolls has founded his decree in a confidence reposed by *Fox* in *Mackreth*. The question is only as to the inference to be drawn from the facts. In order to make out the confidence reposed by *Fox* in *Mackreth*, a few circumstances are to be attended to. Mr. *Fox* came of age in August 1777: very soon after that, in September 1777, the connection between him and *Mackreth* began; the first step was the purchase of two annuities, at six years’ purchase; then the loan of 3000*l.* on mortgage of the *Surry* estate. Then *Mackreth* engages to become a trustee, to sell the estate for payment of debts, apparently with no other intention than to relieve *Fox*’s necessities. On the 16th of January they met to execute the trust deed, but the meeting terminated in the agreement for the sale of the estate. On the 24th of April there is a conveyance of the estate, and *Fox* has nothing to show for the balance of 28,000*l.* but *Mackreth*’s accountable receipt and charge of the money on the *Surry* estates. On the 21st of March, *Mackreth* had sold the estate to *Page* for 50,000*l.*; towards the close of 1778, he had lent *Fox* 1000*l.*; in June 1779 there was a treaty for an annuity, part of the consideration of which was to be the 1000*l.* The account made up in 1778, is agreed on all hands to be a false one. In June 1779, another account was made up, then *Mackreth* applied for duplicates of the conveyances, which *Fox* complied with. These are the material facts from which it is impossible to doubt that the fullest confidence was reposed by *Fox* in *Mackreth*, and that *Mackreth* did, on the 16th of January, take an undue advantage of that confidence. On the 16th of January, every transaction of day shows that *Mackreth* represented himself as *Fox*’s friend. The account given by *Mackreth*, in his answer relative to the loan of 3000*l.* and the annuity, is contradicted by the evidence; a full confidence is not to be expected to an answer in general, which is proved false in any particular. Suppose it to be true that the proposal for the sale came, on the 16th of January, from *Fox*, how easy was it for *Mackreth* to suggest that an immediate sale would be better than entering into a trust deed, and to make the formal proposal come from *Fox*, though the suggestion was his own: but be this as it may, no just inference is to be drawn from it to the merits of the cause. *Fox* entered into the [*] contract with *Jackman*’s valuation in his hand, and at twelve o’clock at night drops his price to 39,000*l.*; how is this to be accounted for, but by his confidence in *Mackreth*? If the sale had been fair and open, I should be precluded from these observations: but there never was a contract which was more suspicious from the characters of the parties

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† The case alluded to is that of Lord *Stauford*.

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concerned. The counsel on the other side have said, that when they were treating for the sale, the confidence was over, and that they were in a market; but it is impossible a sale should be negotiated under circumstances more private. It is as near the case of a trustee selling to himself as can possibly be, but still it shows what opinion Fox had of Mackreth; it is highly probable that the latter had the sale in his contemplation when he made the appointment: this is rendered probable by his having a valuation. This observation has received no answer, except that it was natural that in order to sell as a trustee he should have a valuation, but no notice was given to Fox of that valuation by Hampton; Fox and his agents were kept in the dark as to that survey. Mr. Fox came to Garforth's to meet Mackreth as a friend, where Mackreth, having in his possession a valuation, and concealing that fact, induced Fox to sell for 7000*l.* less than the only valuation he had: if there was nothing more in the case, Mackreth ought not to retain the great advantage he has made; as a friend Mackreth should have let Fox know he had sold the estate to him for 11,000*l.* less than he (Mackreth) had contracted to sell it for to Page. Then Fox parts with the estate on a bare accountable receipt and charge upon the estate; the money is not deposited in the hands of any banker, and the estate is conveyed to Page without any notice of the charge, which made an end of the charge. This plainly shows that Fox trusted entirely to Mackreth; the settlement of the account is another mark of the most implicit confidence, and the whole transaction as to the loan and the annuity, proves the same; but the gentlemen on the other side say, that the accumulation of the facts is immaterial, and that the application of *juncta jvant* ought to have no weight. If it was proved that the transaction of the 16th of January was perfectly fair, I allow their arguments would apply; but whilst the great question of evidence is with respect to the fairness of the transaction of the 16th January, it is material to show the complexion of the whole transaction taken together, and especially the power Mackreth had over Fox. This has the [*] more weight, because it is incumbent on Mackreth to prove that the transaction of the 16th January was fair and honest. To whom is it to be imputed but to him, that there was no witness of the transaction? He ought not to have entered into such a treaty with a young man, without having a witness present. The whole transaction speaks the truth of the Master of the Rolls's declaration, that there was a confidence reposed in Mackreth; and it will need very little argument to prove that that confidence was abused. Either Mackreth had a valuation at the time of the treaty or not; if he had not, he induced Fox to sell at 7000*l.* less than his own valuation; if he had, he concealed that circumstance from Fox, and now conceals it from the court. Another thing that is urged is, that Fox has confirmed the transaction; if he has confirmed it, I admit, it cannot be rescinded; but the first preliminary to a confirmation is that the party should be previously apprized what it is he confirms. When the present comes to be compared with the confirmations in the cases where they have been held to bind, it is very unlike them, for none of them, except the execution of the duplicates of the conveyances, have the least tendency to confirm; they are mere consequential acts. In *Chesterfield v. Janssen*, and *Cole v. Gibson*, there were clear acts of confirmation; here they are only carrying the contract into execution, and the execution of the duplicates only shows how much Fox was in the power of Mackreth, it was only done for the purpose of getting something which might be called an act of confirmation; and Farrer refused to consent to their execution, but with the proviso that it should not be considered as a confirmation. If Mackreth had first informed Fox of the real value of the estate, and then he had affirmed the contract, it would have been final; on the contrary, he was in distress in 1779, and absolutely in the hands and

power of *Mackreth*; and so he was at every period when the confirmations were obtained; no one act was done with a knowledge of the value of the estate. By his own admission, *Mackreth* cheated *Fox* out of 600*l.* or 700*l.* in his first account: In *May*, 1781, he sent him another account, rectifying the mistake; in the mean while he had lent him money on bond, and bought an annuity of him. If not from friendship, from what principle did *Mackreth* act, but from the desire to get this estate, or as much as he could out of *Fox*? It is urged that this transaction cannot be set aside, because, if it is, no man can purchase at a fair price, [*] and sell at a greater, without the fear of having the transaction rescinded. But was there ever a fair case where such an advantage was made as in the present? No man acting fairly would deal with a young man without witnesses; no man acting fairly would conceal his having a valuation. It is to be hoped such a transaction will never exist again; but no fear can arise to fair transactions, from such a transaction as this being overturned.

Lord Chancellor. (9)—The doubt I have is, whether this case affords facts from which principles arise to set aside this transaction, which will not, by necessary application, draw other cases into hazard. And without insisting upon technical morality, I don't agree with those who say that where an advantage has been taken in a contract, which a man of delicacy would not have taken, it must be set aside; suppose for instance, that *A.* knowing there to be a mine in the estate of *B.* of which he knew *B.* was ignorant, should enter into a contract to purchase the estate of *B.* for the price of the estate, without considering the mine, could the court set it aside? Why not, since *B.* was not apprised of the mine, and *A.* was? Because *B.* as the buyer, was not obliged, from the nature of the contract, to make the discovery. It is therefore essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery. The Court will not correct a contract, merely because a man of nice honour would not have entered into it; it must fall within some definition of fraud; the rule must be drawn so as not to affect the general transactions of mankind. His Honour has referred a great number of accounts to the Master. If the account in the present case is necessary to lead to the judgment, the latter should have been suspended till the former was taken. I shall state the case merely as it stands on the transaction upon the day of the sale; I shall also consider that there are certain terms which I must find in analogy to the character of a jurymen. In the first place, I must find the value of the estate to be the sum for which it was sold to *Page*; for it will be in vain to argue that there was any confidence reposed in *Mackreth*, or fraud committed by him, if no loss accrued to *Fox*. If the value of the estate be that which *Mackreth* gave, it would on that side put an end to the dispute. If the value be such, as now represented, that [*] does not make an end of the matter, unless the advantage was procured by some of those frauds which the Court has taken notice of. The Master of the Rolls has decreed the defendant to be a trustee for *Fox*. He becomes such by consequence, for if it be true that he has cheated *Fox*, though the legal estate passed to him, the equitable claim is *Fox*'s. But this argument does not turn from the mere circumstance of value, for suppose the estate to have been worth 50,000*l.* on the 16th *January* 1778, and that *Mackreth*, bought it by fraud for 40,000*l.* whereby *Fox* was cheated of 10,000*l.* and, suppose, by cross events, the value had sunk more than one-fifth, and *Mackreth* had sold it, according to the then market price, at 40,000*l.* or even so low as 30,000*l.* would it not be

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(9) See also another report of the judgment by Mr. Cox. 2 vol. 320.

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equally true, that he ought to be decreed to pay 50,000*l.* for the sum due, in respect of what *Fox* lost by the fraud of *Mackreth*? And if you can ever establish in a court of equity, that a contract has been fraudulently made, and that a party to that contract has lost by that fraud, in the common case, whatever the conveyance be, the party will have that money to pay. (10)—Therefore his Honour went upon the ground that the value of the estate at the time of the sale was 50,000*l.*, that Mr. *Fox* was consequently cheated, and, the contract being to be set aside, the sale made afterwards was a sale made for him who had in point of equity a right to it. Taking this as the point on which it turns, I wish to go through the facts. *Fox*'s distresses began about four years before he came of age, he had involved himself and his friends in annuities upon the hardest terms. When he came of age, as a man of honour, he was under a duty of imperfect obligation, to relieve the friends he had involved. In this situation, which was observed by his friends before he became of age, a plan was proposed, to sell such part of his estate as was disposable. When he came of age, he had an estate of about 1260*l.* a-year, in *Surry*, that was an estate tail, capable consequently of being disposed of when the time for cutting off the entail should arrive. He had also an estate in *Yorkshire*, of about 11,000*l.* a-year, for life, and one in *Ireland*, for life, of which he was in possession, of about 6000*l.* a-year. His friends had resorted to a man of character in the profession to conduct the disposal of the *Surry* estate. On the 23d *August* 1771 no steps had been taken, even to get in the amount of the debts, or negotiating with the annuitants for an accommodation of their demands, though it must occur to every [*] body, that before he came of age would have been the best time for arranging those contracts, and conversing with the annuitants about arranging that circumstance. He came of age in *August*, and upon the 23d of *September* it appears he had been introduced to *Mackreth*; the terms they were then upon were not confidential. *Fox* applied to *Mackreth* to raise 3000*l.* and informed him of his situation, and that no security could be made him, till the next term, when a recovery might be suffered. *Mackreth* then proposed an annuity at six years' purchase; (something near half less than the actual value) after that, a man cannot talk of any delicacy without the bars of the court of justice. If a court of justice is bound to affirm such transactions, it is not from its approbation of them, but because it would be impolitic and distressful to the general affairs of mankind to cut them down. When that situation was disclosed to *Mackreth*, a mortgage of that estate would have been an effective lien upon it, and the way to have made a security would have been, to have insured his life, till the end of next *Michaelmas* Term. Under that species of contract the merciful and just manner of relieving his distress would have been, to have advanced the money on such mortgage. On the other hand it ought to be observed, that though *Mackreth* took a different course with him, it seems to have been (if there is not too much levity in saying it) in the course of his business, for it is in evidence that *Mackreth* dealt in this way on the distresses of mankind. On the 6th of *November* a recovery was suffered of the *Surry* estate to *Farrer*, to such uses as *Fox* should direct, but nothing was then done towards getting rid of the debt. On the 24th of *December*, *Fox* sends to borrow a sum of money, *Mackreth* lent him 3000*l.* and took a mortgage by way of security. Great pains have been taken to impute great generosity to *Mackreth* on this occasion, I see no reason to say so, neither do I see that there was at that time any plot; on the contrary, I consider that as a very fair transac-

(10) See Lord *Eldon*'s observations, 8 *Ves.* 353; 9 *Ves.* 247., &c. as in the various references to note (1) *antea*.

tion, and it would be an extravagant conjecture for a court of justice to suppose that the object of lending him that was to get the legal estate into his hands, to tamper with it afterwards to the prejudice of Mr. Fox. When once one gets beyond the evidence that is before the court, there is no end of conjecture. *Mackreth* then acquiesced with the project of delivering *Fox* from his distresses, and industriously offered himself and *Dawes* as trustees, for that purpose, I do not agree, that, by so doing, there was any plot [*] to get him into bad hands. There are no better men for trustees, on such an occasion, than those who will do the business. And though Lord *Ligonier* and Lord *Grantley* were proposed on the part of *Fox*, yet the others as men of business might be quite as proper. When *Mackreth* proposed himself as a trustee, I think he meant what he said, and that there was a real act of friendship intended, to make the most of the estate, and to deal to the best advantage with the annuitants. An awkward circumstance is, that himself and *Dawes* were of that number, *Mackreth* himself to the amount of 250*l.* and *Dawes* of 600*l.* a-year; these being 850*l.* and I suppose there being five or six times that quantity on the whole. When he undertook to deal with these annuitants at large, and himself in the number, he certainly took upon himself a very delicate charge. The manner in which he dealt for this annuity was to consider the arrears which had been incurred, from the 23d September to the 23d of December gone, as due to the annuitant, and then he was to take up that sum at the original price, so that nothing more was to be paid for the annuity but an arrear that had been incurred after the rate of 850*l.* a-year which was a little more than 200*l.* to take up that, and, when he had done so, that annuity was to be discharged.—I do not approve of that—who can possibly suppose Mr. *Mackreth* recommending himself to Mr. *Fox*, as a man who would deal more vigilantly with annuitants than another, and in the first instance allowing the annuity to stand for an arrear which had gone only for a quarter, I think he should have considered it as a loan from the beginning.—So of *Dawes's* share of the annuity, it should have been considered as discharged on the 24th December: he bought however on the part of Mr. *Fox*, but with his own money. Upon the 16th of January, instead of considering it as an annuity discharged on the 24th December, he considers it as bought up for his own use, and therefore he was to continue an annuitant of *Fox*, after he had bought it of *Dawes*, to the 16th of January. It is impossible to say he has not in this gone a little further than that species of indelicacy which a court will look at, for he shall not have the annuity till January, it shall be considered as discharged in December; and yet, from the manner in which he has dealt with the annuitants in general, it seems to me as if he thought this a fair way of dealing between man and man in that market, and I should have thought so universally, had I not observed that in regard to one of the [*] annuities, he has compromised it at a lower rate than that, and instead of regarding the annuity as due, as to the principal sum, and the arrears due, which is the manner he charged it in October 1778, it turns out that he had bought it below that rate, although he had charged *Fox*, in October 1778, up to the rate as if he had made the bargain fairly with the annuitant.—In these two instances his conduct must be rescinded, and he has acted unfairly in the execution of the trust he had taken upon him. Mr. *Fox*, the plaintiff, has therefore the advantage of finding Mr. *Mackreth* dealing with him respecting himself, as a man who would serve him with fidelity, though he had an interest himself, and acting unjustly in a manner which a court of justice must rescind. From hence till the 16th January, I consider him as a trustee, and whatever consequences arise from that relation, must belong to this business. He sends

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down an (11) agent (*Hampton*) to value the estate, and he has managed so as to prevent the court from looking much at what was done in consequence of the orders which were given to *Hampton*. Courts of justice are to act temperately, but must consider what is the result from the several parts of a transaction. On one side it is said that he sent down the agent to value the estate, as meaning to treat himself, but I think the fair construction is, that he sent him in the character of a trustee. He was beginning to act as such with an intention to sell the estate at the best advantage, therefore it was part of the execution of the trust. *Hampton's* knowledge was *Fox's* knowledge. But wherever a trustee gains intelligence as a trustee and servant to the *cestui que trust*, and conceals the circumstances he so gains knowledge of from the *cestui que trust*, he may have the hands of a court of justice laid upon him as a fraud. I find myself at a loss as to what passed between *Mackreth* and *Hampton*; he went down twice, the first time he was there a week, the latter time longer, but the result of the intelligence he got the second time could not be of any use. The intelligence he got the first time was communicated to *Mackreth*. In these circumstances he begins to deal with him, and there also he remains in the character of a trustee. *Fox* had a valuation of the estates, by *Jackman*, not a long one, but such as afforded general terms, such as the naming a gross value of the estates, and the number of years' value set upon them. This *Fox* had in his hands, and with this valuation *in medio*, *Fox* insists that the value of the estate is 45,000*l*. [*] *Mackreth* reasons, and asserts first, that the houses are valued too high, that he would only give $\frac{1}{2}$ of the value, he offering 14 years' purchase for them.—That he will not give 30 years' purchase for the land, he will only give 28 or 29 years' purchase; that he looked upon the valuation of the copyhold part of the *Horsely* estate as much too high. He argues upon them, and haggles *Fox* down, till, either from conviction, or from the consideration of his circumstances, they meet at 39,000*l*. The question arising on this is whether the character of trustee shall vary *Mackreth* from a stranger; for it is not argued that in the case of a stranger treating in the same manner, the transaction must be cut down. If a trustee treats, with a stranger as a trustee for himself ever so fairly, the vendee would be a trustee for the first *cestui que trust*, and the court will not consider whether the consideration was fair or not, which must be by reason of the confidence which the accident of their relation introduced; then the question is, whether I can find, as a juryman, that *Fox* agreed to the proposal in confidence of *Mackreth's* knowledge and integrity. If a stranger had said to *Fox*, I will deal fairly with you, and, afterwards, misrepresented the value, I should hold that to be an abuse of a confidence which he was bound to observe. Was that the case here? I confess I am in doubt; I do not see that I have facts from which to draw that inference. But if *Mackreth* had not the character of trustee, he might retain that of confidential friend. I am at a loss to find that. They seem to have dealt as men usually do, each endeavouring to represent the case as makes best for his own interest. There are two facts to be settled: First, what was the real value (12): No body will think *Mackreth's* criticisms on *Jackman's* valuation unnatural or unfair. There is evidence that *Jackman* would have given the money at which he estimated the estate if he had had it; that it sold to *Page* for more, which is strong evidence to shew that the value was more. Suppose it to be allowed

(11) At Mr. *Fox's* expense, and without any communication to him. 6 Ves. 697.

(12) Not for the purpose of the decision in a case between a trustee and his *cestui que trust*. Vide 8 Ves. 353. 9 Ves. 247, &c. &c. as in note (1).

that

that the real value was what *Page* paid; let us see what followed: On the 16th of *January*, *Garforth* put the agreement into writing, and it was signed by both parties. This struck me as shewing an eagerness to have the matter fixed; but, from the evidence, it appears that the article for the sale was not entered into till the day after, when they carried it to one degree more of formality. It stands upon the articles till the 24th of *April*. In the mean time [*] *Mackreth* had sold the estate. No man of delicate honour would have carried the contract into execution on the 24th of *April*, after he had sold the estate on the 20th of *March*, and have kept that transaction a secret. He was obliged by every call of honour, to consider himself as a trustee; but I fear if I should lay down the rule, that the Court will compel whatever a man of strict honour would do, I should go too far, and might lay down a rule which would be inconvenient in other cases. Observations are made on the note given by *Mackreth* to *Fox*; it was an accountable receipt, bearing 5 per cent. interest. *Fox* had not the money. I think this, as *Mackreth* was to apply it in the payment of annuitants, was fair. The security, being only that of an equitable lien, does not afford any inference of fraud being intended; and, in fact, the money has been paid. The method of making up the account has been urged as a mark of confidence. It is true, it is so, but the question is, whether it was a confidence that he would give him a fair value? As to the confirmations, they follow so naturally from the occasions, that they cannot be said to have been sought for by way of obtaining confirmations.—With regard to confirmations, they have been considered different ways. In *Chesterfield v. Janssen*, it turned upon *Spencer* doing the acts with his eyes open. (13)—There he stood liable to the former bond; but there is another way in which confirmations operate, that the party looks upon himself to have been dealt fairly with. In *January*, *Fox* did not consider himself as having had an unfair advantage taken of him. In that view it goes further, for there was no complaint till 1781: it is fair to infer that so large a difference of value was not expected in so long a time. When would a transaction of this sort be at an end, if not after three years? And it would have lasted in the same way till 1800 had not the discovery been made of the subsequent sale. It goes much to the question of the real value, that it could not be fixed till a subsequent sale. If the price paid by *Page* was accidental, no man could argue from that as to there being a fraud in *Mackreth*. It must be ascertained what was the real value of the estate at the time of the sale. Evidence of this has been given only on one side, *Mackreth* having been advised to shew that contract, which leads to a consideration how far it would be conducive to the question to have that part further enquired into; it would put an end to the [*] question on one side, on the other it would leave it open. I have been desirous of stating my doubts, because, possibly I may think it necessary to have this undergo a further consideration. After conversing with his Honour, and near half the judges, a doubtfulness and difference of opinion has arisen as to the policy of laying down the rule, either of law or evidence to the extent now contended for. I own I hesitate to lay down any such rule on the subject. It is of no use to lay down the rule of law, if the rule of evidence is left indefinite. Two ways have struck me, one to let this matter go to a further inquiry, the other, to which I have been more inclined, to have it reheard, with the assistance of those who will furnish me with the means of laying down the rule which may set men at ease for their property, that, when they observe a transaction for the sale of an estate cut down for inadequacy of value, after it has been affirmed by conveyances, and

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(13) So also in *Morse v. Royal*, 12 Ves. 355.

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acquiesced in for three years and a half, I may know how I can state such a case as mankind shall understand, without putting them in fear with respect to the regulation of their property.

The cause stood over till this day when the Lord Chancellor gave judgment to the following purpose.

Lord Chancellor.—I have considered of the case of *Fox v. Maccreth*, and have examined it very much; I have read over all the arguments, my opinion is not varied since I spoke of it at large; I cannot see that the decree is wrong, and therefore it must be

Affirmed. (14)

(14) The defendant applied to re-hear this appeal; but it was refused, and decided on the 12th March, 1789, that an appeal from the *Rolls* to the Lord Chancellor cannot be re-heard. *Vide* 2 Cox, 158. *S. P. East India Company v. Boddam*, 13 Ves. 421. There may, however, be a re-hearing at the *Rolls* previously to an appeal to the Lord Chancellor. *Vide* 8 Ves. 561. and 2 Ves. & Beam. 359.

The defendant then appealed to the House of Lords from the decree of affirmance; and on the 14th March, 1791, the same was affirmed with 200*l.* costs. *Vide* 4 Bro. P. C. 258. octavo edition.

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Lincoln's Inn
Hall, Dec. 12.
Mr. Justice
Buller for the
Lord Chancellor.

[*] The Attorney General and the Wardens of the Poor of St. SAVIOUR'S, SOUTHWARK, - - - - Plaintiffs;

versus

GOULDING and Another, - - - - Defendants.

(Reg. Lib. 1788. A. fol. 83.)

Devise of freehold houses to 8 poor persons of a parish: the gift being void, a personal fund [directed by the will to be] attached to the freehold, is also void, by the statute of Mortmain, and the court will not apply the gift to any other purpose: the words *what shall be left* seeming to apply to a particular fund, shall not be held to carry the residue. (1)

THE information and bill stated *int. alia*, that by a private act of parliament, in the 33 H. 8. the parishes of St. Margaret and St. Mary Magdalen Overy's, were united by the name of St. Saviour's, and that the wardens of the poor for the said parish were incorporated.

That Hannah Allen, being seised of nine freehold houses, in *Vine Yard, Tooley Street*, and also possessed of leasehold houses in *Park Street* and *Kennington Road*, and of 800*l.* 4 per cent. bank annuities, and 200*l.* *East India* stock, made her will, dated the 18th of December 1782, and thereby gave several small sums to be paid out of the *East India* stock, and then gave in the words following: "To John Bailey, for his life, all the rents which shall arise from my nine houses freehold, in *Vine Yard, Tooley Street*; my leasehold in *Park Street*, two houses at No. 42 and 43 *Queen Street, Park*; and my houses in *Kennington Road*, in *Kent Street*; one house at *Walworth*, by the turnpike.—At the death of John Bailey, I give my nine houses in *Vine Street*, eight to eight poor people that have paid most and longest to the poor's books in St. Mary Overy's parish, as the books shall prove, the corner-house to repair them. I give to John Bailey my leasehold house the corner of the *Parsonage Walk, Newington Butts*, for his life. And the dividends of 800*l.* in the 4 per cent. bank annuities, at the death of John Bailey, I give to the eight houses for ever; to each house the 4*l.* every year for ever, as the Bank pays the dividend.—I give to the poor of St. Mary Overy's parish, all the rent that shall arise on my leasehold in *Park Street*, by the *Borough, London*; two in *Queen Street*, No. 42 and 43, in the *Park*. I give to such poor as paid most and longest in the parish, thirty half peck loaves, thirty sacks of coals, and thirty half guineas, to those thirty poor folks, to be

(1) This case has been approved and acted upon repeatedly; the Master of the *Rolls* saying, that although he once doubted it. (2 Ves. jun. 588.) he then fully concurred. See *Attorney General v. Whitchurch*, 5 Ves. 141. 145. *Chapman v. Brown*, per Lord Eldon C. 6 Ves. 404. 410., &c.

paid there at *Michaelmas* and *Midsummer*; what is left to be given to the poor in smaller sums." And the said testatrix appointed the defendants executors of her said will, and gave them 50*l.* each for their trouble; but she did [*] not make any disposition of, or respecting the residue of her personal estate and effects, save what is before set forth. The testatrix made ten several codicils and testamentary schedules to the said will, nine of which are in the form of promissory notes, by which she gave, or promised to pay several small pecuniary sums to several persons in the said notes mentioned. The testatrix died the 5th of *October*, 1786, without revoking the will or codicils, which were proved by the executors in the ecclesiastical court; and leaving the said *John Bayley*, her cousin and next of kin, to whom the executors paid the interest and dividends of the stock during his life.

John Bayley departed this life on the 29th of *August* 1787, having made his will, by which, *inter alia*, he gave all the residue of his personal estate to the defendants, to be equally divided between them, and appointed them executors of his will, which they also proved in the ecclesiastical court.

The plaintiffs filed the present bill praying that it might be declared that the bequest of the interest and dividends of the 800*l.* Bank 4 *per cent.* annuities, to charitable purposes, is a good and subsisting bequest for the benefit of poor persons of that parish, or for some other charitable purpose, for the benefit of the said parish, and that the residue of the testatrix's personal estate is by the said will given for the poor of the said parish, and prayed the consequential accounts, and that the defendants might pay over the dividends since the death of *John Bayley*, and pay the savings and dividends, or transfer the Bank annuities, and make the distribution of coals directed by the will, and account for the residue of the testatrix's personal estate.

The defendants, by their answer, admitted the facts stated in the plaintiff's bill, but denied that the interest of the 800*l.* is a good and subsisting bequest; the bequests being attached to the nine freehold houses, and therefore void by the statute of *mortmain*, and submitted that the residue was not void; and the defendants claimed all such interest as *John Bayley* would have had in the personal estate.

The cause came on to be heard before Mr. Justice Buller, sitting for Lord Chancellor, who after hearing the arguments, immediately gave judgment to the following effect:

[*] Mr. Justice Buller. — The questions are, whether the gift of the 800*l.* can be supported; for this purpose it is argued not to be within the statute. With respect to the houses, the gift of them is void: then, if the gift of the 800*l.* cannot be applied according to her disposition, another question arises whether the Court is to apply it to some other matter *ejusdem generis*. The Court has certainly thought it could vary the use, but the rule may be drawn from the cases, that wherever the Court had directed the sum given to be applied to a different use, there has been proper ground for the Court to say the use to which it has been applied is consistent with the use declared in the will, but there have been subsequent cases which have varied the rule: where, according to the intention of the testatrix's applying the fund otherwise than to the persons inhabiting the houses, would be contrary to that intention, the inhabitants of the houses being the principal objects of bounty: if they cannot be supported, it is not to be given to the poor in general.

The second question is, whether the testatrix has given the residue to the poor. It is impossible to put any other construction than that of the defendant's counsel; the small sums given, are out of a particular estate. In expounding the words of the will, it is necessary to take the whole of the will together. The testatrix begins every new sentence with the

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words *I give*: this helps on to the true sense of the will. The words "at the death of *J. Bayley*, I give the rents, &c." is all one sentence. Mr. *Hollist* contends it ought to be divided, but the Court will not divide it unless it is necessary. The words, *I give*, will occur twice in the sentence either way; *what is left*, only signifies what is left of that subject.

Bill dismissed.

*Lincoln's Inn
Hall.
December 17.*

FORBES *against* Ross.

(Reg. Lib. 1788. A. fol. 275.)

A trustee in a will, which directed money to be lent at such rate of interest [as they should think reasonable]; by consent of his co-trustee keeps it at four per cent. ordered to pay five, [and the executors to pay the costs of taking the accounts as to that interest.]

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THE testator had directed two trustees, of whom *Ross* was one, to lay out money which should come to their hands, on heritable or personal security, at such rate of interest as they should think reasonable: the two trustees agreed that *Ross* should take the money at 4*l. per cent.* and he admitted by his answer, that 4*l. per cent.* was [*] not the utmost interest which could have been made on personal security. It was admitted on the other side, that *Ross* was a man of large property, and that the testator in his life-time had been used to place money in his hands at 4*l. per cent.* but it was insisted that this was a personal favour, and that, according to the directions of the testator's will, the money ought to have been lent at 5*l. per cent.*

Lord Chancellor was of opinion that *Ross* ought to be charged with interest at 5*l. per cent.* He was anxious to declare he imputed no blame to the defendant, and on this ground refused to give costs against (4) him: but he conceived that, being a trustee, he could not, according to the known rule of courts of equity, be permitted to benefit himself in a contract on the subject of his trust; that though the testator did in his life place money in his hands at 4*l. per cent.* yet having by his will directed the best and utmost interest to be made, his intentions of accommodating *Ross* by loans at a lower rate of interest, must be considered as ending with his life (2); and he had made it the duty of his trustees to procure the best interest. His Lordship repeated that he wished to have it understood, that he decided singly on this ground, that a trustee cannot bargain for himself, so as to gain an advantage. (3) (4)

(1) *Vide etiam Newton v. Bennet, Perkins v. Bayntun, and Treves v. Townshend, antea*, 1 vol. 359. 375. 384. and the several references: *Paty v. Steel*, 4 Ves. 620; *Mosley v. Ward*, 11 Ves. 581, &c.; *Raphael v. Boehm, ibid.* 92. and 13 Ves. 407. 590. See also the various cases collected and commented on by Sir T. Plumer, Vice Chancellor, with the greatest care in *Tebbs v. Carpenter*, 1 Madd. Rep. 300. *et seq.*

(2) The decree accordingly directed interest to be computed on the sum lent by the testator at the rate of 4*l. per cent.* only to the testator's death; and from that time at 5*l. per cent.* &c. &c.

(3) See *For v. Mackreth, antea*, 300. and the notes.

(4) This cause came on for further directions, 14th April, 1790, when L. Chancellor ordered the executors to pay the costs of taking the accounts as to the 5*l. per cent.* interest. Mr. Brown's MS. note.

SCOTT *against* TYLER.

(Reg. Lib. 1788. B. fol. 614.)

RICHARD Kee the putative father of the plaintiff, *Margaret Christiana Scott*, by his will devised as follows "I will that my executors hereinafter named, do with all convenient speed after my decease, purchase the sum of 5000*l.* *South-sea annuities* 1751, in their names, upon trust, that they or the survivors or survivor of them, do stand possessed thereof, and receive the dividends from time to time as the same shall grow due, and thereout pay and apply the sum of 60*l.* yearly and every year, in and towards the maintenance and education of my grandson, *Richard Dryer*, till he shall arrive at the age of 15 years, and if my said grandson should then choose to go to the University, from thenceforth to pay and apply 120*l.* *per annum* in and towards his said maintenance and education at the University, but [*] if my said grandson shall not go to the University, I will, that out of the sum of 5000*l.* and the dividends and savings arising thereon then made, a sum not exceeding 400*l.* be applied in placing out my said grandson to any trade, profession, or employment he may, with the approbation of my executors, choose, and my will and meaning is, that the surplus dividends, if any, over and besides such allowances as aforesaid, from time to time be invested in the like *South-sea annuities*, and that the said capital sum, with such surplus dividends, be transferred to my said grandson at his age of twenty-one years, if he shall be living, but if he shall die before that age, I give the said annuities, between Mrs. *Elizabeth Tyler*, who now lives with me, and my god-daughter, *Margaret Christiana Tyler*, equally to be divided between them, share and share alike, but the share of my god-daughter not to be transferred to her till twenty-one. And if she shall die before her arrival at that age, I give her share to the said *Elizabeth Tyler*, for her own use and benefit; also I will that my executors hereinafter named, do, with all convenient speed, after my decease, purchase the sum of 10,000*l.* *South-sea annuities*, 1751, in their names, upon the trusts after mentioned, that is to say, upon trust, that they and the survivor and survivors of them do stand possessed thereof, and out of the dividends, pay or permit the said *Elizabeth Tyler* to take or receive yearly and every year, as the same shall become payable, the sum of 100*l.* for the maintenance and education of my said god-daughter *Margaret Christiana Tyler*, until her age of twenty-one years, which will be on the

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Lincoln's Inn Hall, 20th Dec. [S. C. from Lord *Thurlow's* own MS. note, 2 Dick. 712. and see the argument at length, 1 Hargr. Jurid. Arg. 22. 46.]

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A condition annexed to a legacy, that the legatee shall marry with consent of her mother, if under 21, is a valid condition; and upon marriage without such consent shall go to the mother, under a gift of a general residue. (1) [Second point, as to an executor paying his own debt by a sale or pledge of his testator's estate; whether such a transaction can stand. (2)]

(1) The condition in this case was *precedent* to the legacy; in which it differs from *Jones v. E. of Suffolk*, *antea*, 1 vol. 528, and many other cases. Sir *W. Grant* M. R. referring to the principal case, says, it had been sometimes thought to amount to a decision, that the residuary bequest was as strong as a specific devise over of the fund in question; contrary to Lord *Hardwicke's* decision in *Wheeler v. Bingham*, 3 Atk. 364. His Honor, however, adds, "But it appears from the copy of Lord *Thurlow's* judgment in *Dickins*, "that he thought it had been properly held that a residuary bequest left the conditional "legacy in statu quo; and that the ground of his decision was that Mrs. Scott never came "under the description to which the gift of the 10,000*l.* was attached." See in *Lloyd v. Branton*, 3 Meriv. 118. See also *Hemmings v. Muncckley*, *antea*, 1 vol. 303, 304. and what is said by the Lord C. in *Stackpole v. Beaumont*, 3 Ves. 97. as to the legality of a condition confined to the age of twenty-one; *et vide per* Lord *Thurlow*, *post*, 437. and the instances put by Lord *Thurlow* in his judgment on the principal case, 2 Dick. 721.

As to some of the later cases on these conditions, both precedent and subsequent, which include almost all the preceding, and contain many observations on the principal case, see the important one of *Clarke v. Parker*, 19 Ves. 1. *et seq.*; *Lloyd v. Branton*, 3 Meriv. 108, &c.; *Aislabie v. Rice*, 3 Madd. Rep. 256, &c. *Parnell v. Lyon*, 1 Ves. & Beam. 479. *D'Aguilar v. Drinkwater*, 2 Ves. & Beam. 225.

(2) *Vide* *Andrew v. Wrigley*, *post*. 4 vol. 124.; *Hill v. Simpson*, 7 Ves. 152, &c.; *Macleod v. Drummond*, 14 Ves. 353. and 17 Ves. 152, &c. 1 Ball & Beat. 167.

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18th day of June 1785, and add the surplus of such dividends, from time to time to the said capital stock, and at her said age of twenty-one years, I will that one moiety of the said capital stock of 10,000*l.* and the savings thereof be paid and transferred to my said god-daughter, in case she shall be then unmarried, and that at her age of twenty-five years, if she shall be then unmarried, I will that the other moiety of the said 10,000*l.* be then transferred to her for her own use and benefit, but in case my said god-daughter shall marry before her said age of twenty-one years, with the consent of her said mother, Elizabeth Tyler, I will, that one moiety of the said 10,000*l.* with the savings made, be settled on my said god-daughter, for her separate use, and her issue, in such manner as her said mother, Elizabeth Tyler, shall think proper, and the other moiety thereof, with the surplus dividends disposed of as she my said god-daughter shall think fit, but in case my said [*] god-daughter shall depart this life before her arrival at the age of twenty-five years unmarried, then and in such case I give the said 10,000*l.* to her said mother, Elizabeth Tyler, for her own use and benefit. I give, devise, and bequeath to my executors, and to their heirs, all my freehold messuages or tenements, with the appurtenances, in Denmark Court, in the Strand, being No. 2, 3, 4, and 5, in trust, that they and the survivors of them, and the heirs and assigns of such survivor, do from time to time receive the rents and profits thereof, and lay out the same in government securities, to the use of my aforesaid god-daughter Margaret Christiana Tyler, till her age of twenty-one years, and from and after her attaining that age, I give the said messuages, and the rents, issues, and profits received by my said executors, in the mean time to my said god-daughter, her heirs, executors, administrators, and assigns, for ever, but if my said god-daughter shall depart this life before she shall attain the age of twenty-one years, I give and devise the said messuages, or tenements, and premises to my said grandson, Richard Dryer, if living, his heirs and assigns, but if dead, I give and devise the same to the said Elizabeth Tyler, her heirs and assigns for ever. I give to my executors the principal sum with interest, which at my decease may be due to me, on the security of the River Lee, upon trust, that they do receive the interest thereof, till my said god-daughter Margaret Christiana Tyler shall attain twenty-one, for her separate use, notwithstanding her coverture, and from and after her attaining that age, to transfer or assign the said securities, with the money due thereon, to my said god-daughter, for her own use and benefit; but if my said god-daughter shall die before she shall attain the age of twenty-one years, I give the principal money and interest, for or on account of the River Lee, to the aforesaid Elizabeth Tyler, for her own use and benefit." He then gave several other legacies, and appointed as follows: "all my freehold estate in Whitechapel, in the county of Middlesex, and all bond debts, and other debts owing to me, by any person or persons whomsoever, (particularly a sum of 2300*l.* and interest due to me from Maurice Dryer, and his wife, on mortgage of their estate) and effects as well real as personal, whatsoever and wheresoever, and of what nature or kind soever, I give and bequeath the same to the aforesaid Elizabeth Tyler, her heirs, executors, administrators, and assigns for ever, for her great care in looking after me in my several illnesses, and whom I look [*] upon as my wife in every respect, which I would have made her had it not been for a foolish promise I made to my late wife, in her life-time; and constitute and appoint the aforesaid Elizabeth Tyler, George Shakespear the elder, Charles Mahew, and Philip Nind, executors and trustees of this my last will and testament."

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In 1774, James Cockburn left to the plaintiff, Margaret Christiana Tyler, a legacy of 100*l.* and made the defendant Tyler executrix, and Richard Kee died in September 1776, without revoking his will. The plaintiff

plaintiff *Samuel Scott*, about the latter end of 1782, paid his addresses to the other plaintiff *Margaret Christiana*, and by her consent, made proposals, to the defendant, *Elizabeth Tyler*, relative to a marriage with her daughter, offering to settle her whole fortune, together with a reasonable part of his own, upon the marriage; which proposal was rejected by the defendant: but on the 17th of May 1783, he married the other plaintiff, *Margaret Christiana*, without her mother's consent.

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The River *Lee* Navigation Bonds, were with other securities for money, deposited by the testator, with Messrs. *Hankeys* the bankers, locked up in a box for safe custody, and, after his death, the defendant *Tyler*, also, deposited securities with them, locked up in a box, for the like purpose, and having in the year 1779, engaged in large concerns in shipping, &c. the banking house was in advance for her, in very large sums of money, and about the year 1779 or 80, the defendant, *Elizabeth Tyler* caused the box to be opened and several bonds and securities, among which were ten bonds and securities, of the River *Lee* Company, No. 171 to 180, inclusive, for 100*l.* each, to be taken out, and deposited the same with the partnership, as a general security for monies advanced on her account.

In 1786 *Elizabeth Tyler* became a bankrupt.

The original and supplemental bill prayed that the right of *Margaret Christiana* to the 10,000*l.* *South-sea* stock, might be declared, and the same settled on the marriage; an account of the rents, and of the houses in *Denmark Court*, and payment of the 100*l.* legacy given by *Cockburn*, an account of the River *Lee* [*] bonds, against the *Hankeys*, and that the same might be deposited with the Master, and that they might pay all monies received on account thereof to the plaintiffs.

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The defendant, *Elizabeth Tyler*, by her answer, denied that the marriage of the plaintiffs was by her consent, and insisted that for want of performance of that condition, the plaintiff *Margaret Christiana* had forfeited her legacy of 10,000*l.* *South-sea* annuities which had fallen into the residuary estate of the testator.

With respect to the bonds, the *Hankeys*, by their answer, deposed they believed the same to be the property of *Elizabeth Tyler*, and did not know them to be the property of the testator, and to be specifically devised by his will, and hope they shall not be decreed to deliver them up till they are paid their demands on *Elizabeth Tyler*.

The case was argued on three days in *Easter*, and three in *Trinity Term* 1787.

Mr. *Mansfield* for the plaintiffs.—Two points arise in this case. 1. In respect to the 10,000*l.* *South-sea* annuities. 2. In respect to the deposit of the river *Lee* bonds. 1. We say that *Margaret Christiana Tyler*, having married under her age of twenty-one, is entitled to the legacy of 10,000*l.* If she married under that age, a moiety was to be settled on the marriage, the other to be paid as she should direct. She having married, is therefore become entitled to it. But it is objected, on the other side, that she is not entitled, because her marriage with the other plaintiff was not with the consent of her mother, whose consent was made necessary by the testator's will. The doctrine of our law is, that wherever there is a personal legacy, or a portion, payable out of money only and not out of land, and a condition is annexed of not marrying without consent, the clause restraining marriage is construed to be *in terrorem* only and void, and it is immaterial whether the condition be precedent or subsequent. In this point our law follows the civil law as far as personal property is concerned. If this were a new case, and to be argued on principle, it would perhaps be a matter of more difficulty, but the law seems to be [*] so fully settled, that it scarcely seems to be necessary to do more than mention a few of the leading cases. *Hervoy v. Aston*,

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v. *Aston*, Forest, 212. 1 Atk. 361. and Comyns's Rep. 726. — *Reynish v. Martin*, 3 Atk. 330. *Elton v. Elton*, 1 Wils. 159. According to which cases the plaintiff would be entitled to this legacy, and the condition requiring Mrs. Tyler's consent would be *pro tanto* void even if it be taken as a condition precedent. But, in truth, this is a condition subsequent; the plaintiff was entitled absolutely to this legacy although she did not marry; marriage is not necessary to give her the legacy: the condition would therefore operate to divest a gift which would otherwise have effect. The testator meant her to have the legacy in all events at a certain period, and the clause respecting her marriage with Mrs. Tyler's consent, was only meant to accelerate the payment.

Mr. Scott on the same side. — Independently of the clause containing the condition of marrying with consent, it may be argued that the testator intended the legatee to have the 10,000*l.* in every event except one, namely, that of her dying *unmarried* under the age of twenty-five years, which, by her marriage, is now become impossible. That is the only event in which he has given the legacy over; for it is settled that the bequest of a residue is never considered as having the effect of a bequest over of a particular legacy. But, on the authorities, it is clear that, this being a personal legacy, the condition, as far as it requires the consent of Mrs. Tyler, is *in terrorem* only, and therefore void in law; and that in fact, the condition, as far as it is legal, is complied with by the marriage. The case of *Long v. Dennis*, 4 Burr. 2052. shews how averse the Court always are from conditions in restraint of marriage, by requiring consent, even in the case where the legacy issues out of land. However, in the case of personalty the rule is fully established from *Hervey v. Aston*, that in this case our courts follow the rules of the civil law, and that by that law, two strict maxims are laid down. 1. That marriage ought to be free. 2. That a testament shall not be inofficious. With reference to these two maxims, they held a condition requiring consent to marriage to be void, whereby, 1st, They encouraged matrimony upon sound principles of policy. 2d, They prevented heirs from being defeated of their inheritance, by conditions requiring them to obtain consent from particular persons, which was [*] a mode invented to evade the laws respecting inofficious testaments, by requiring a consent which the testator knew to be impossible to obtain. On this subject the civil law was very strict, and it was immaterial whether the condition was precedent or subsequent, or whether there was any gift over or not; nor did it signify what relation the legatee bore to the testator. The condition was absolutely void. — Godolph. Orphan's Leg. p. 1. c. 15. This shews that the only effect of the condition was that it made it necessary for the party to marry, and the other part of the condition, requiring consent, is unlawful and void. Marriage alone therefore is a compliance with the condition. Godolph. p. 3. c. 17. And the subject is more fully considered in Swinb. p. 4. c. 12. p. 266. — That these rules have been adopted by our law, is clear from many cases, particularly *Wheeler v. Bingham*, 1 Wils. 135. (2) *Elton v. Elton*, 1 Wils. 159. *Pigot v. Morris*, Sel. Ca. in Can. 26. and in 2 Eq. Abr. 214. This last case may seem at first to be against us, but it was decided on the double times of payment. — Then *Underwood v. Morris*, 2 Atk. 184. adopts the rule, *Semphill v. Bayly*, Pre. Ch. 562. — *Garbut v. Hilton*, 1 Atk. 381, is a negative authority for us, in this point, and shews that, if a marriage had been had, the condition would have been void as far as it required consent. *Bellasis v. Ermine*, 1 Ch. Ca. 22. Another head of cases is where there has been a provision made on the alternative of not marrying with consent, and there the Court has not relieved against the condi-

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tion; but this is a distinct ground and does not apply to this case. *Gillet v. Wray*, 1 P. Wms. 284, is a case of this nature. *Hemmings v. Munckley* (*ante*, vol. 1. p. 303.) does certainly, in some measure, contradict *Underwood v. Morris*; but whether that case be wrong or right, is at present immaterial, as here is no devise over.

Lord Chancellor. — The civil law seems to have determined it to be illegal to give one person a general control over another in respect to marriage; but I always apprehended this to be *restrained to a general control, and not to the preventing a rash or precipitate match*. (3) Here it is confined to marrying with consent *under twenty-one years of age, and the question is, whether there is any thing in sound reason to make a restraint to this extent illegal*. Confining it to years of immaturity is a very different thing from a general restraint of marriage.

[*] Mr. Scott. — The second question in this case is, in respect to the deposit of the bonds by Mrs. Tyler, in the hands of Messrs. Hankey, the bankers, whether they can retain them against the specific legatee for the private debt of the executrix. (4) No assignment was ever made of them: it was merely a deposit of part of the testator's property, and made for a purpose that had no reference whatever to the purposes of the will. *Mead v. Lord Orrery*, 3 Atk. 235. (5) lays down the rule, to be sure, pretty broadly, that executors may assign or pledge the testator's estate for any purpose whatsoever: but that case has been much shaken since by *Bonney v. Ridgard*, (6) before the Master of the Rolls, December 3, 1784, where his Honor was of opinion that the rule was carried too far in *Mead v. Lord Orrery*: for though it is clear that an executor may dispose of assets, and any body purchasing of him is not bound to see to the application of the money, yet this shall never protect any body who purchases from an executor with a full knowledge that the money was to be misapplied; and that mortgaging a leasehold property of the testator, did not seem to be the natural way of dealing with assets, and was in itself a very suspicious circumstance. *Nugent v. Gifford*, 1 Atk. 463 (7), is also a strong case for the defendants, but is inconsistent with that of *Bonney v. Ridgard*. (8) Now this is a case where the defendants must know that the purpose for which these bonds were pledged could be no part of the purposes to which they were applicable by the will, for it was a deposit made in the course of a private transaction between them and Mrs. Tyler.

Mr. Graham on the same side. — It seems a very fair inference from the words of the will, that the plaintiff Mrs. Scott became entitled to her legacy at 21 in all events: though in some cases not to be paid then, yet it vested. The clause is oddly worded, and there are several events which are not provided for expressly, such as her marrying with consent after 21. It is given over only in one particular event, that of her dying *unmarried* under 25; which seems to imply that her interest was absolute in all other events. But on the point of the illegality of these conditions, the cases are positive, *Bellasis v. Ermine*, is a case of great authority, for it had the assistance of the judges. So *Fry v. Porter*, 1 Ch. Ca. 138.

(3) See in *Stackpole v. Beaumont*, 5 Ves. 97.; the report in 2 Dick. 721.; and *Hemmings v. Munckley*, *ante*, 1 vol. 303, 304.

(4) *Vide Hill v. Simpson*, 7 Ves. 152, &c. 167, &c.; *Macleod v. Drummond*, 14 Ves. 353, and 17 Ves. 152, &c.; 1 Ball & Beattie, 167.

(5) *Vide per Sir W. Grant M. R.* on this and the case next cited in *Hill v. Simpson*, 7 Ves. 167.; and see 17 Ves. 164.

(6) Stated and approved by Sir W. Grant M. R. 7 Ves. 167.; and in *Beckford v. Wade*, 17 Ves. 97, 98, 99.; and lately reported 1 Cox, 147.; see it also stated in *Andrew v. Wrigley*, *postea*, 4 vol. 130.; and in *Macleod v. Drummond*, 17 Ves. 165.

(7) See upon *Nugent v. Gifford* from Reg. Lib., in *Andrew v. Wrigley*, *postea*, 4 vol. 135, 136.; in 7 Ves. 166.; and in *Macleod v. Drummond*, 17 Ves. 163.

(8) See, however, *postea*, 4 vol. 136. 7 Ves. 166, 167, and 17 Ves. 165, &c.

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The distinction is between a legacy issuing out of land and a mere personality: for as to real [*] property it must follow the rules of the common law on the subject of conditions. *Reynish v. Martin; Hervey v. Aston*. The Digest lays down those conditions as void in the most unqualified terms possible. Dig. L. 35. Tit. 1. laws 62, 63, and 64.

Mr. *Alexander* on the same side. — There are two questions before the Court; the first relates to the sum of 10,000*l.* S. S. annuities, the other to the bonds deposited with the *Hankeys*. With respect to the first, I contend that Mrs. *Scott* is become entitled in respect of her marriage. The rule of this court is, that wherever a personal legacy is given to any one upon condition of marrying with the consent of a third person, and no express provision is made in the case of the legatee's marrying without such consent, the part of the condition restraining the marriage to being with consent is held to be *in terrorem* only, and the legacy vests on the marriage; and this is so, whether the condition be precedent or subsequent; whether it be a portion or a legacy; whether the restraint be temporary or perpetual; and notwithstanding there is a general devise of the residue. But they will object on the other side, 1st. That this rule does not apply where the condition is precedent. The doctrine is adopted from the civil law, and it would be almost unnecessary to argue that this distinction does not apply, had not Lord Chief Baron *Comyns*, in his argument in *Hervey v. Aston*, taken great pains to prove that there was a distinction in the civil law between conditions precedent and subsequent; I admit the civil law had such a distinction, but it did not apply to this sort of condition. The rule was, that where the condition was impossible, against good morals, or against positive law, there was no distinction whether it was precedent or subsequent, the legatee took the legacy discharged of the condition. The Lord Chief Baron himself states the rule so, in p. 788. Now this sort of condition was prohibited by the *Lex Julia*, and therefore falls within the rule. This the Lord Chief Baron admits in p. 736, but he cites Dig. 35. Tit. 1. l. 64, which relates to a restraint of another kind, and omits to cite Dig. 55. Tit. 1. l. 72. *Si arbitrato Titii Scia nupserit, hæres meus ei fundum dato, etiam sine arbitrio Titii, eam nubentem, legatum accipere respondendum est; eam legis sententiam videri, ne quod omnino nuptiis impedimentum inferatur*. Then, if it was contrary to law, it is the same as if it had not been written, and no distinction [*] whether it was precedent or subsequent. With respect to the modern practice of our ecclesiastical courts, we are informed it is consonant to the rule of the Digest. The cases in our law are principally *Bellasis v. Ermine*, 1 Ch. Ca. 22. *Semphill v. Bayly*, Pre. in Cha. 562. *Pulleing v. Reddy*, 1 Wils. 21. *Reynish v. Martin*, 3 Atk. 330. which last was a condition precedent. The cases where the condition is subsequent, prove the same thing. Those where the resolution is in favour of the forfeiture, proceed on different circumstances, *Sutton v. Jewks*, 2 Ch. Rep. 95. *Jervois v. Duke*, 1 Vern. 19. are on the devise over; *Stratton v. Grymes*, 2 Vern. 357. *Aston v. Aston*, 2 Vern. 452. on the same circumstance; *Gillet v. Wray*, 1 P. Will. 284.; *Creagh v. Wilson*, 2 Vern. 572., on the alternative provision; *Piggot v. Morris*, Sel. Ca. in Chan. 26. *Hervey v. Aston*, Comyns, 726., was a case of land; in *Chancy v. Graydon*, 2 Atk. 616. there was a devise over; *Hemmings v. Munckley*, (*ante*, vol. i. p. 303.) which seems to have been a hasty determination, but there is a devise over; from all which cases taken together, it seems that no distinction has been taken on this subject between conditions precedent and subsequent. The next objection that will be made will be that, though this rule holds good of a portion it does not extend to a legacy. This will be supported by an argument drawn from the civil law, and which is stated by Lord Chief Baron *Comyns*, in his argument, fol. 735., and a conclusion will be drawn that it applies only to portions.

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But this proceeds on a mistake of the *Lex Julia*, the policy of which was to compel persons to marry, by all the means that could be devised. It is not therefore probable that such a law should be confined to portions; and indeed the words of the law equally comprehend legacies. So in *Reynish v. Martin*, which was the case of a legacy, not of a portion, for the party was entitled to a large provision besides. The third objection is, that though the rule may obtain where the restraint is perpetual, it is otherwise where it is temporary, and, as in this case, to cease at 21 or 25 years of age. If the question were to turn upon the policy of the thing, I admit this might be a very wise distinction, but it appears from all the cases, that there is no ground to argue it on policy. The objection proceeds on the supposition that the determination turns on the illegality of the restraint; in the civil law, it is true, it is so, but this Court has adopted the rule of the civil law in part only; and as a rule of [*] construction of the testator's intent, that the condition should be *in terrorem* only; and the question with us is, only, whether the condition was meant *in terrorem*. Upon this ground it is, that in those cases, where there are devise over, the condition has had its effect; but if the condition was considered as being in itself illegal, there being a devise over could make no difference; but the cases in our law say, that where there is a devise over, the testator having made an express provision in the event of the condition not being complied with, shews sufficiently that he did not mean it *in terrorem* only; and this reconciles these cases with the others, which would be unintelligible if they proceeded on the illegality of the restraint. The same observations arise upon another class of cases; those where there is a provision made for the legatee in the alternative: if the condition were illegal, it would be equally so in that case with any other. In the *Roman* law, it was immaterial whether there was a devise over or not; for this reason it is, that in our law, the constant language is, that the condition is *in terrorem*; but there is no such language in the *Roman* law, in ours not a word of the condition being absolutely illegal and void, except in the case of *Long v. Dennis*, where the language, attributed to Lord Mansfield by the reporter, is so extraordinary as to leave room to doubt the accuracy of the report in other respects. From hence we may gather, that though our law has adopted the *Roman* law in part, it has not done so on the whole, and, whatever the distinction in that law might be between temporary and perpetual restraints, our law has not followed them; no such distinction is to be found in any of the cases. If it be possible for a man to impose such a restraint till 21, he has not done it here. Where he meant to give the property over, he has done it. In the bequest to his grandson he has devised it over; so in the river *Lec* securities there is a devise over. Consider the policy of construing it so here; the residuary legatee had the custody of the infant, it was her consent, if any, that was to be had to the marriage; how easy it would be to her to encourage a match, without being proved to have consented to it; and she would, herself, be the person to take advantage of its being without consent, and obtain the forfeiture. If the point, therefore, turned on any ground of policy, there is strong reason why, in this case, the restraint should not hold. The last point they will contend is, that the devise of a residue is equivalent to a devise over; and this will be [*] founded on the case of *Amos v. Horner* (9), 1 Eq. Ca. Abr. 112. but there is no principle of good sense upon which it should be so, and the authority of *Amos v. Horner* (9) has been expressly denied in *Hervey v. Aston*, *Garret v. Priddy*, and *Wheeler v. Bingham*, 1 Wils. 135.

Mr. Hardinge, for the defendant *Elizabeth Tyler* and her assignees. —

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(9) It seems there was no decision in *Amos v. Horner*. See 3 Atk. 365. and Fort. 215, 216.

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One of the four *alternative contingencies* upon which the daughter's interest is to depend, and that which alone can found her claim to the limitation of this *entire sum* for her benefit, is not accomplished. She has not "married before the age of twenty-one, with her mother's consent." The alternative, respecting this marriage with consent, is not merely *formal*, nor is it by way of *substitution* for other alternatives, and with an *equal benefit* annexed; but *substantially* different, and with *additional benefit*. She is to attain the age of twenty-one,—a mere contingency of time;—*or*, she is to attain it unmarried:—*or*, she is to attain the age of twenty-five, before marriage—*or*, she is to marry with her mother's consent under the age of twenty-one. Upon every one of these alternatives after the first, her state is improved.—In the first event she is to have certain freehold houses.—In the *second* she is to have an immediate 5000*l.*—In the *third* she is to have an additional 5000*l.*—In the *fourth* she is to have 10,000*l.* before the age of twenty-one, but 5000*l.* is to be settled upon the marriage.—This fourth contingency interposing its earlier effects, saves the legatee from the restraint of the other stipulations, and by an act very much in her own power.—The will does not compel her to be unmarried, or to wait for the age of twenty-five, or even that of twenty-one, before her marriage—for she is only to marry with her mother's consent before twenty-one, and the 10,000*l.* is from that instant her own.

2d. There is no condition respecting marriage, after the age of twenty-five, and there is no condition requiring consent after the age of twenty-one.—The contingency of time is definite, but coupled with a condition essential to its benefit, or indefinite, except as falling within a certain period, but so as to admit of being defined by the performance of a condition,—the *marriage with consent*. The will may be construed as if the words had been "when she has attained the age of twenty-five, unmarried, or when she has married before twenty-one, with her mother's consent."

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[*] 3d. There is no direct legacy to the daughter; the gift is to executors, and they are to pay at the several periods for her benefit.

4th. She has a sure provision if she arrives at the age of twenty-one, married or unmarried, and married with or without consent.

5th. Upon failure of the other events described, there is a marked and clear limitation over to the mother. But it is argued that upon the failure of this event, (*i. e.* of the marriage before twenty-one, with consent) no limitation over to the mother appears in the will; and it is true that, *in terms*, no such limitation is to be found.—But there is a limitation over of the whole 10,000*l.* directly, to the mother, in the very next clause to this, upon the event of the daughter's death before twenty-five, *unmarried*—and she, the mother, is residuary legatee.

The assignees of the mother argue thus in their claim to the 10,000*l.*

First, The intention of the testator is clear to make the condition *peremptory* and limit over the interest.

2dly, The condition which he has imposed, is *unexceptionable* if it stood alone, and as indispensable to ANY benefit under the will;

Or, 3dly, At least it would be *unexceptionable* here, as put by way of alternative, and enabling a BETTER provision.

4thly, It would avail here as a limitation of TIME;

Or, 5thly, As being followed by a limitation over.

First, As to the intention.—The will has clearly meant, that her marriage without consent, before twenty-one, should put her in the same condition, respecting her fortune, as if she died before she attained the age of twenty-five unmarried.

It has been argued, that a right in the whole 10,000*l.* vested in the daughter at the age of twenty-one, which this clause respecting the li-
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limitation over, if it operates at all, is to divest; [*] and that a right cannot be divested by implication; but that argument overlooks the word *unmarried*.

Another of the counsel has more plausibly reasoned, that, inasmuch as the limitation over is expressly upon *another event*, it can only operate, in case of that event, as a limitation over; so that, in this respect, the mother has any interest at all, it must be in her character of residuary legatee, but that she cannot, in that character, take this interest, because the testator has implied that she is only to have it in a certain event which has failed: but why cannot she be excluded in one view from this interest, and admitted in another which is in *alio jure*, and which by devolution of law, upon a partial intestacy, falls into the residuum?

The counsel adds, that if the mother is excluded, the daughter alone can take *this* interest. But that is not a correct inference; for if the residue given to the mother must be formed after a deduction of this interest, the part which is deducted will be a residue undisposed of.

2d. *The condition is good — even if it were the case of a direct legacy to the daughter, upon condition of a marriage, with consent of the mother before twenty-one.*

It is a good condition by the civil law, and good in this court, which has not implicitly followed the rule of the civil law as to legacies, nor with an accurate reference either to the reason of that rule, or to the distinction upon it.

By the civil law the condition of remaining unmarried is void, and so the condition which requires *any* consent, — though it be that of the parent. — This too with, or without, a limitation over superadded, and, the general rule which dispenses with a parent's consent be just, the extent of it thus far has very good sense in it.

The reason, however, of the rule as given in *Swinburne*, is perfectly ridiculous. It stands thus:

“A restraint upon marriage in general is void. This rule is peremptory and universal. A requisition of consent, which the testator knows will never be given, would baffle the rule; every [*] testator *may* be guilty of this evasion; every nominal trustee *may* be an accomplice in; a testator who is a parent *may* act in this point against his own child, therefore, says the civil law, we must cut the knot, “*rescindi debet quod audanda legis gratia ascriptum est.*”

But even the civil law, with all its enmity against the condition, lets the effect of it in another shape, for if a *marriage with consent*, is to mark the *time* at which the legacy will be due, the Ecclesiastical Courts will not anticipate the event, or act upon it by halves. In the case of *Lervey v. Aston*, Com. Rep. 735., the words of Lord Chief Baron Comyns are these: “If a legacy be given upon a preceding fact, that may or may not be done, or be to be paid at such a time as may or may not come; if the fact be not performed, or if the time should never come, the legacy would be lost *by the civil law.*” — And in page 744., “when a legacy is given to be paid at a certain time, or upon a certain act which is to be performed, nothing is due till the time incurred, or the act performed, by the civil law;” he cites for this Dig. l. 36. tit. 2. 21, 22. — In page 756. he puts the very case of money given to be paid upon marriage with consent, and holds that in that case the legacy could be suspended by the civil law.

He seems to consider the *marriage* and the *consent* as two events that are indispensable marks of the time at which the gift shall begin to speak.

This rule, however, of the civil law, as it respects the mere condition, not implicitly adopted *here*, and the reason of it never.

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For *here*, the condition of a parent's consent is good and meritorious. Lord Hale and Keeling, in *Fry and Porter*, approve it in very emphatical terms.—Lord Chief Baron Comyns does the same in *Hervey v. Aston*, Com. Rep. 748.

The idea of a condition *in terrorem*, as 'tis called, is perfectly ridiculous—what is a terror which is never to intimidate? Would a man of sense impose it? Would any but an idiot act upon it?

[*] The intention of the restraint is to guard against an improvident marriage, and punish it if it shall have taken place.—In this view, which has the soundest policy, the restraint is here *stricti juris*, to a certain extent, and though it is difficult perhaps to ascertain the limits with accurate precision, they are marked enough to bear directly upon the case before us.

According to Lord Chief Baron Comyns, in *Hervey v. Aston*, page 729., "If money be directly given to A. in consideration that the legatee shall not marry without consent, and there is no devise over, the condition is ineffectual even here," that is, in other words, if an absolute gift is qualified by that condition imposed upon it.

But it seems agreed, that if it be a devise of real estate or of a sum charged upon a real estate, the condition would be effectual though without a devise over.

These distinctions are not very becoming (9), and they offend one the more, when the degree in which the rule taken from the civil law is adopted here, has been justified by a view to the uniformity of the two courts—though uniformity in the same court is thus overlooked. Suppose portions to A. and B., two daughters, of the same value, and qualified by the same condition, what can be more irrational or incongruous than to repel the condition as to one of the daughters, and adopt it as to the other, because the fund happens to be different?

The reason of rejecting the rule where there is a limitation over, is explained by Lord Chief Baron Comyns to be this: he says, the intention is better marked by that circumstance, and he contends, that if a similar intention can be collected *aliunde*, it should have the same effect.—Lord Hardwicke indeed says, the intention is considered as favouring the devisee over, and as vesting a right in *him*—that it is a condition, therefore in that view taken more as beneficial to *him*, than as prejudicial to the legatee restrained.

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But if money be given to be paid at twenty-one, or marriage with consent, both courts are agreed that it is a good restraint, and that no money will be due 'till one or other of those events [*] has taken place (10)—and a *fortiori*, if the money be not given to the legatee, to be paid at those periods, but given to another, in trust for that payment. The distinction is taken up in *Hervey v. Aston*, page 752., and the point itself decided by an obvious implication resulting from the actual judgment in that case.

The 2000*l.* given by that will was personal estate, but it had the same condition imposed upon it which had also fettered a real devise in the same will, and that condition was "a marriage with consent,"—yet, if the condition of requiring assent is void in a personal gift, the marriage, without the consent, would have entitled the legatee.

But the argument of Lord Chief Baron Comyns is more direct, 751. He construes the will as if expressed thus:—

"When she marries with consent, I give her 2000*l.* more." He first argues from a general intention, covering both funds, and pointing at

(9) See 3 Ves. 95, &c.

(10) See *Hemmings v. Muncieley*, ante, vol. i. 303, 304.; and *Stackpole v. Bennett*, 3 Ves. 89, &c.

the time when the gift shall take place: but if the condition were necessarily bad in a personal gift the time could not be so qualified.

He then reasons from its being a personal gift, in augmentation of the real devise preceding it, and he lays particular stress upon the want of a gift immediately to the child.—He says, that if she were to die before the first portion could be paid, she would have neither of the gifts, and he comes, page 753., to the very point; asserting the import of the will to be, that the 2000*l.* shall be due to her upon her marriage, with consent, and puts it as if so expressed.—He affirms the condition to be lawful, as a condition precedent, and states that, in every other personal gift, conditions precedent must be performed—that even the civil law holds that rule, and that we have no instance the other way, either at common law or in this court.

He distinguishes conditions precedent and subsequent with particular care, so as to refuse what had been too inaccurately called precedent conditions, and which he considers in the light of subsequent.

[*] The distinction taken by him is between some event preceding the payment of the legacy, (whether coupled with a condition, or importing a condition itself,) and a condition put by way of restraint upon a gift actually made complete, by the will, before the restraint is imposed.

(3) But the condition here would be good as enabling a BETTER provision by way of alternative.

If a condition of marriage, with consent, is by way of proviso to amplify a gift, there is no case where this condition, remaining unperformed, the additional benefit can be received.

"You shall either have 20*l.*, or if you marry with consent, you shall have 30*l.*" shall the legatee marry without consent, and have 30*l.*? *Creagh v. Wilson*, 2 Vern. 572. appears to be directly in point. Stress is laid upon this principle, too, in *Hervey v. Aston*, page 750.

The testator in the case before us gives 10,000*l.* at twenty-five, to his daughter unmarried, but if she marries with consent, before twenty-one, he accelerates the payment and relaxes the condition of unmarried.

No case can be found in which a new and ulterior benefit, being the reason for a conditional gift, it can operate in defiance of the terms imposed.

4. If the condition here were in itself absolutely void, either taken as precedent or subsequent, yet it would be good as a mark of the TIME when the legacy should be payable—this too even by the civil law.

In other words, if a personal legacy to a daughter is made payable upon an event marked in the time of it, by this condition upon her marriage, the legacy is not payable till the time so described and qualified is come. Lord Chief Baron Comyns, in *Hervey v. Aston*, is express to this point, page 737. 744. & 756.

Swinburne, page 269., states it as no condition if put as an adverb of time *quamdiu* or *dum sola fuerit*, &c. Lord Chief Baron [*] Comyns treats it as a limitation of time, and in that view adduces the civil law as being agreed with him. This way of considering it parries the inconvenience of refusing the condition, as annexed to a personal gift and adopting it as a gift of real estate.

He distinguishes between a legacy "*if, &c.*" and the same condition preceding the legacy, as the mark of its time.

5. The condition here is good as accompanied with a devise over.

The whole 10,000*l.* is given over to the mother, if the daughter should die unmarried.

If the testator had said "*unmarried before twenty-one*," it would have been more clear; but, even as it is, it is clear that the testator meant *unmarried before twenty-one with consent*, not adverting to any marriage after twenty-one and before twenty-five.

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In every other case of the event failing upon which the particular legacy is given, the mother takes by limitation over, nor can a reason be assigned why it should be omitted here, where such peculiar anxiety is marked for the effectual performance of the condition.

The local position of the limitation over of the whole 10,000*l.* is not immaterial. It comes immediately after the gift of the 10,000*l.* upon a marriage with consent before twenty-one.

If this were not the key to it, the absurdity would be extreme, for the testator would then say, "If you should marry before twenty-one without consent, and die before twenty-five, having so married, it is not to be given over, though, in failure of all the other events, it is."

In *Hervey v. Aston*, a marriage with consent having preceded in the same will, subsequent words, referring generally to marriage, are bound as referring to a marriage with consent.

Thus it appears, that in the case before us, the intention is clear from a conditional gift, the condition too is good in itself — good, as a limitation of time, — good, as annexed to a better provision, — and good as accompanied with a limitation over.

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[*] Mr. Hargrave (11) for the assignees of Mrs. Tyler.—Two questions occur in this cause; the one as to the bonds deposited with Messrs. Hankeys, with respect to which I am not instructed to interpose: the other concerning the 10,000*l.* claimed by Mr. and Mrs. Scott, which is a question of great importance, as it involves the general doctrine of the court, as to gifts on condition of marriage being merely *in terrorem*.

Four times has this Court called in the assistance of the judges of the courts of law upon different branches of this doctrine. Lord Clarendon, in the case of *Bellasis v. Ermine*. [1 Ca. Ch. 22.] 15 Car. 2., was assisted by Lord Chief Justice Hyde and Lord Chief Baron Hale. Lord Keeper Bridgman, in the case of *Fry v. Porter*, 21 Car. 2., had the three chief assessors. A few years after the Revolution, in *Bertie v. Lord Falkland*, Lord Somers called in the aid of the Chief Justices Holt and Treby; and, early in the last reign, *Hervey v. Aston* was heard before the Lord Chancellor, assisted by the Chief Justices Lee and Willes, with Mr. Justice Comyns. But notwithstanding this, and that new cases occurred in the latter part of Lord Hardwicke's time, yet, during the time that the great seal was in commission, the case of *Mansell v. Mansell*, as a power of jointuring given to a testator for life on condition of his marrying with consent, came on and underwent great discussion. In the interval between that case and the present time, two cases only seem to have occurred, *Randal v. Payne*, (*ante*, vol. 1. p. 55.) and *Hemmings v. Munckley*, (*ante*, vol. 1. p. 203.) neither of which appears to have been much debated.

The present case induces a necessity of re-examining the principles and authorities of the doctrine in question; I shall, therefore, examine the present cause as far as relates to the condition of marriage with consent annexed to the legacy given by Mr. Key.

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Under the will in question, Mr. and Mrs. Scott claim, in Mrs. Scott's right, the legacy of 10,000*l.* South-sea annuities, and found their claim thus: that Mrs. Scott having married under twenty-one years of age, the material part of the contingency in Mr. Key's will, respecting the legacy, has taken effect, and therefore that she is entitled to the stock with the accumulation [*] of interest. Against this the assignees contend that she is not so entitled, because she has married without the consent of her mother. The bill states a kind of consent to have been obtained, but this is totally contradicted by the mother's answer, and there is not a syllable of proof of such consent, so that the fact must be taken to be,

that she has married under twenty-one, and without the consent of her mother.

The case has been argued on behalf of the plaintiffs in two ways. First, That Mrs. Scott's title has accrued within the contingencies under the will. Secondly, and principally, that the condition in the will, as far as it requires marriage with consent of the mother, is a condition *in terrorem* only, and, as such, null and inoperative.

With respect to the first point, it is not much relied upon; the true answer to it will be to state the contingencies. The first contingency is that upon her attaining her age of twenty-one, a moiety of the stock shall be transferred to her, *in case she should be then unmarried*; the event is, that at twenty-one she was, and still is, married to Mr. Scott: this contingency, therefore, has not happened.—The next contingency, is her attaining twenty-five, and being then unmarried, when the remaining moiety is to be transferred; but to this there is a double answer; she has not yet attained twenty-five, and she is married. The third contingency, her marrying under twenty-one with consent of her mother: but this contingency neither has happened, nor ever can happen, for she married under twenty-one without consent, and has continued married till after her age of twenty-one. These are the only contingencies in the will, and are so framed that no one of them is complied with. It has, however, been attempted to raise an argument in favour of Mrs. Scott from the devise over to Mrs. Tyler, which gives the 10,000*l.* to her, only in the event of Mrs. Scott's dying before twenty-five unmarried. But this is inconclusive, because the real question is, as to Mrs. Scott's right, not Mrs. Tyler's; because it vests Mrs. Tyler's right on the devise over, which really depends on the residuary clause, because the title on which which rests depends on the contingencies, and because the implication that Mrs. Scott is entitled to whatever Mrs. Tyler is not, is too violent; therefore proceed to the second and great point in the cause.

[*]. The position maintained by the plaintiffs is, that it is the rule of the Court, in case of legacies of personal property, to consider conditions in restraint of marriage as merely *in terrorem*, unless where upon the breach of the condition the legacy is expressly devised over to a third person. That such a rule should ever have existed appears wonderful, and, if the authorities were out of the case, the rule could not be supported.

There is no policy in our law which objects to reasonable restraints on marriage (12), although it will not admit of an absolute prohibition: on the contrary, it prohibits marriage under twenty-one, without consent of parents or guardians. A legacy, therefore, upon those terms, instead of being against law, coincides with and enforces it: the legality of such a legacy has been recognised in several instances, notwithstanding the condition has met with much opposition. It was once contended that, a devise of land, on condition of marrying with consent, the condition is null: but that point was settled in favour of the condition in *Fry v. Carter*, 1 Ch. Ca. 138., and in *Bertie v. Lord Falkland*, 3 Ch. Ca. 129. In the case of a portion to be raised out of land, in *Hervey v. Aston*, which also settled that the condition is effectual, on a legacy having reference to a portion to be raised out of land: all agree that it is so of a legacy in money, with a devise over. In *Mansell v. Mansell*, the condition was held effectual, on a power of jointuring with land, by the unanimous opinion of the Lords Commissioners. A question arose before Lord Hardwicke, whether the condition was effectual, with respect to money to be laid out on land. This was in 1743, in the case of *Ready*

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(12) See *per Lord Thurlow*, 2 Dick. 721.; and *per Lord Loughborough*, 3 Ves. 97, &c.

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v. *Colson*, a note of which is among Mr. *Joddrel's MSS.*, but the point went off, the determination of it being unnecessary.

Is there any latent intent of the testator, which the rule seeks to establish? The rule seems to imply this, construing it to be *in terrorem* seems as if the intention was to deter the legatee; but what terror can arise from a condition known to be a nullity? It is impossible that the testator can mean to impose a void condition. Is there, then, any rule of equity which interferes? There can be only one to have recourse to, and that is, that this Court will relieve against penalties. It will so; but then it is part of the rule to exact compensation: and where that cannot [*] be given, the rule does not apply; but in these cases there can be no measure of compensation but the penalty, so that the rule is completely inapplicable. Where then is the foundation of the rule of considering restraints on marriage, as only *in terrorem*, to be traced? The answer given is, that the common law rejected such conditions as invalid; that our Ecclesiastical courts followed the rule of the *Roman* law, and that when the Courts of Equity assumed a concurrent jurisdiction over legacies, they held themselves bound to adopt the same rules.

With respect to the *Roman* law it certainly was unfavourable to conditions in restraint of marriage; many of its constitutions tend to promote matrimony, and discourage celibacy; the most celebrated provisions are those contained in the law commonly called the *Lex Julia*, but which is properly the *Lex Papia-poppæa*, the *Lex Julia* being a much earlier law. Among the provisions in the *Lex Papia-poppæa*, for encouraging matrimony, is one aimed against legacies on condition of celibacy. It is the 29th chapter of the Remnants of the Law, as collected by *Heineccius*†: the words are “*si quis celibatus aut viduitatis conditionem hæredi legatariove injunxerit: hæres legatariusve, ea conditione liberi sunt, neque eo minus delatam hæreditatem legatumve, ex hac lege, consequuntur;*” the terms of the law, therefore, only nullify conditions wholly forbidding marriage, but do not make invalid all restraints upon it. The frauds upon the law, indeed, induced a large interpretation, extending to conditions, on account of their tendency to celibacy; as where a legacy was given on condition of marrying a particular person, who was so inferior as to make the marriage disreputable, it was deemed equivalent to a condition of celibacy, and brought within the construction of the law: so, if a legacy was given with a condition of marriage, *ex arbitrio alterius*, it was null, under the idea that it was an evasion of the law, by naming a person who would not consent to any marriage. But it is impossible to argue from these provisions to our law, which will endure conditions not to marry without consent, where they do not amount to making marriage impracticable. In arguing upon the law of *England*, it cannot apply in argument that the law of *Rome* was otherwise. [*] The Court cannot adopt the *Lex Julia*, or the *Lex Papia-poppæa*, where our law is contrariant; besides, it is far from clear that the *Roman* law did reject conditions in restraint of marriage to the extent supposed. In the case taken from that law, the restraint is perpetual, and is given to a stranger, not, as in the present case, restrained to a limited time, and, the consent required, that of the parent, a restraint imposed by the law itself. There is no authority to show that such a restraint would have been rejected by the *Roman* law. With respect to the Ecclesiastical Courts it is probably a mistake, that they carried the rule to the extent in which the Court of Chancery is understood to have received it. What authority is there to show that there was any such rule? Since the

† *V. Heineccius in legem Papiam poppæam*, 4to. 1726, p. 94.; and see an ample Commentary on this chapter of the law in the same book. p. 298.

Courts of Equity have assumed a concurrent jurisdiction over legacies, the Ecclesiastical Courts have little cognisance of them, and, when they are called upon, instead of giving the rule to the Court of Chancery, they regulate their proceeding by our Equity Reports. Swinburn and Godolphin are almost the only books which have been produced by the ecclesiastical lawyers; but *Swinburn* is wholly occupied by the *Roman law* upon this subject; and *Godolphin*, where he does not follow him, takes his materials from the reports of decisions in the temporal courts. The only reference by name to a legacy-cause, decided in the spiritual court, is in Moore's Reports, 857., where Judge *Winch* cites *Pigot's case*, in which the legacy was held good, notwithstanding the breach of a condition not to marry without consent. From this case alone, the Courts of Equity are said to have borrowed this rule from the Ecclesiastical Court, and are said to have adopted it, not from conviction of its rectitude, but merely for the sake of conformity between the concurrent jurisdictions, which, in general, is certainly highly laudable, but has its proper bounds. But in the present case, there is a seeming inconsistency, as we are immediately told, that the Courts of Equity reject a very material part of the rule adopted by the Ecclesiastical Court. With them a devise over will be no guard to the condition; but, it is confessed, that, in the Court of Equity, it will render the condition inviolable, a deviation which greatly detracts from the conformity of the jurisdictions.

The doctrine appears, from this view of it, to rest on erroneous opinions, with respect to the *Roman law*, and the practice [*] of the Ecclesiastical Court; but it has become so entrenched by authorities and supported by great names, especially those of *Hale*, *Nottingham*, and *Hardwicke*, that it cannot be wholly denied to be the law of the Court; it can only now be pressed, that the Court will not carry it an *iota* beyond its limits, and resist its application to such a case as the present.—For this purpose I shall contend,

- 1st. That the doctrine is inapplicable where the condition of marriage is precedent.
- 2dly. That the residuary devise, in the present case, is a sufficient devise over.
- 3dly. That the doctrine ought to be confined to immediate and direct legacies, and not to include a trust engrafted upon them, under which latter denomination the legacy in question must be admitted to be.

If I succeed in either of these points, it will negative the claim of the plaintiffs to this legacy of ten thousand pounds.

As to the first of the three points,

I acknowledge that the authorities in support of the *in terrorem* doctrine are, to a certain extent, so strong and so uniform, that they extort submission: but, in so saying, I look to the distinction between precedent and subsequent conditions. Where the condition is subsequent, the authorities are peremptory. I entertained a doubt whether it was not the same as to conditions precedent, being aware that Lord *Hardwicke* had refused to draw the distinction between them, where restraint of marriage was concerned, but, upon serious investigation, I found ample room for exempting conditions precedent, both upon the principle on which equity affords relief, and upon the authorities. And, with respect to the principle on which the Court relieves, it does not extend to conditions precedent.—The only principle to which it can be referred, is that by which the Court relieves against penalties and forfeitures. The rule, with respect to marriage conditions, when adopted by the Court of Equity, therefore, became arranged under that head, and, not [*] being permitted to have any further effect than to alarm the parties, they obtained the name of conditions *in terrorem*. Unfortunately

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that principle required compensation to be made, which will not hold to these conditions: but this only shows that the principle has been misapplied, not that the relief has not been administered under colour of that principle. If this be allowed to be the principle, let us examine whether, on that account, conditions precedent are not entitled to be exempted from the interference. The old distinction between conditions precedent and conditions subsequent, to which Lord Coke calls the attention as of the first importance, is this: that, where an estate is given on a condition subsequent, the estate vests till the condition or contingency takes place, and then it operates by divesting or destroying the estate. It is resorted to in order to enforce the object of the donor by the terror of a penalty, and as it operates by the destruction of estates, it is considered as odious, and *stricti juris*. In a MSS. Common-Place Book of Judge *Dodderidge's* it is said, "Conditions that go in defeasance shall be taken strictly, for they are odious." To the same effect is Co. Lit. 218. a., *Fraunces's* case, 8 Co. 90. Title Condition, in Fulbeck's Parallel, and Shephard's Touchstone. One effect of this disfavor is, that if the condition is, or, by the act of God, becomes impossible, the estate is absolute as if there had been no condition, Co. Lit. 206. So where the condition subsequent is unlawful, Fulbeck Par. p. 2. 66. b. citing *Perkins*, Sect. 139. and 4 Hen. 7. 4. and 2 Hen. 4. 9. Another effect of the odium under which they lie, is that they are construed strictly, *Fraunces's* case, 8 Co. 90. b. and 1 Leon. 305. Thus it appears that, in respect to the penal nature of these conditions, the phrase of *in terrorem* is peculiarly applicable to them.

The condition precedent is of quite an opposite nature, there the estate cannot commence until the condition is performed, or the contingency has happened. It has, therefore, been observed upon it, that "*adimpleri debet, priusquam sequatur effectus*." A passage in *Plowden*, conveys an idea of the dependent nature of the estate on such a condition: Judge *Brown* says, *Plowd.* 272., "If I grant to you, that if ye will do such a thing, you shall have a lease in such particular land of mine; there the condition precedes the lease, as the needle precedes the thread; [*] and, as the needle draws the thread after it, does the condition the lease." The condition, therefore, is beneficial, not penal, and is favoured and benignantly interpreted, according to the intention of the words, Co. Lit. 218. a. 219. b.; — the phrase of *in terrorem* is, therefore, from its nature, inapplicable to them, actual performance is essential to them, notwithstanding their favourable interpretation; therefore, though the condition be impossible or illegal, no estate can arise, and it is the same as if none had been given, Co. Lit. 206. a. and b. 217. b. 218. a. Fulbeck's Par. 2 part, 67. a. The result is, that, though penal conditions to destroy estates may be dispensed with, beneficial conditions to raise estates must always be complied with.

If this doctrine is important at law, it essentially affects the jurisdiction of equity: from the penal nature of conditions subsequent, they, in general, fall within that lenient principle by which courts of equity relieve against penalties: but there is no connection between this and a condition precedent, which operates by giving an estate and conferring a benefit. Upon such a condition, equity cannot interpose; equity cannot raise an estate which the donor has not given. If such a power was to be assumed over one subject, it might soon extend over others, and overleap all boundaries. If the principle on which this argument proceeds be just, is there a reason to be alleged why marriage conditions precedent, when conformable to law, should not be strictly complied with? Nor is the distinction of penalty or no penalty new in this court: there are cases where the form alone will make the difference; as in the case where four or four and a half *per cent.* interest is reserved in a mortgage, with a con-

dition of increasing the interest, in default of punctual payment, to five *per cent.*; the Court will relieve, because it is in substance and in form a penalty; but if the reservation be five *per cent.* with condition of reducing the interest to four on punctual payment, equity cannot interpose, because, though they are substantially the same, there is not in this case the form of a penalty. This is a stronger case than that between estates and conditions; because, with respect to the payment of interests, the difference is only formal; but the difference between conditions precedent and subsequent is substantial.

[*] If I have established the doctrine with respect to the difference between conditions precedent and subsequent, I may proceed to argue that the circumstances of the present case furnish less reason for considering it as a penalty, than cases upon marriage conditions in general. This is not the case of a child left with a portion wholly dependent on a marriage conditioned to be with consent; it is the case of an additional portion; besides the present portion, she has four freehold houses, with the intermediate rents, together with the money due on the *New River* bonds, with the accruing interest upon them, the principal sum of which is 1000*l.*; she has also a contingent interest on the death of the grandson. The present is, therefore, a conditional addition to a provision unclogged by conditions; and there is not so much to affect the feelings of the Court, and impress the idea of penalty, as a person looking only to this provision, might suppose.

I come now to the authorities on the distinction between conditions precedent and subsequent. However nice the discrimination for which I have argued may be, I cannot expect it will be recognised, if the current of authorities should be against me. I shall endeavour to evince, that, however authorities on conditions subsequent are against me, there is an ample stock, with respect to conditions precedent, of respectable authorities that these provisions need not be disappointed.

The gentlemen on the other side have rested their argument on the authorities, they have declined arguing it on principle, and have referred the Court to cases of great weight, principally those in the time of Lord *Hardwicke*. The chief authorities they have relied on are these:—*Daley v. Desbouverie*, 2 Atk. 261., the declaration of Lord *Hardwicke* certainly blends conditions precedent and subsequent; but he only says that the Court puts the most favourable construction on both to prevent forfeiture, and the judgment was given on evidence of a kind of consent to the marriage, on which account his Lordship cites *Farmer v. Compton*, 1 Ch. Rep. 1. and *Wiseman v. Forster*, 2 Ch. Rep. 21., both of which were cases turning on consent. *Underwood v. Morris*, 2 Atk. 184., the report of this case has not a word on the distinction of the two conditions. I agree, however, that the condition should be taken as precedent. *Pul- [*] ling v. Reddy*, 1 Wils. 21., it is not clear that the condition, in this case, was not subsequent. *Reynish v. Martin*, 3 Atk. 330. and 1 Wils. 130. This is an unambiguous decision, that a condition precedent is equally *in terrorem* with a subsequent one, and that the real estates being charged with the legacy, will not exempt it from the rule. *Wheeler v. Bingham*, 3 Atk. 364. 1 Wils. 135., and in Mr. *Joddrel's* MSS. Reports. In this Lord *Hardwicke* repeats his opinion against distinguishing conditions precedent, but the case was on a condition subsequent, and Lord *Hardwicke* treats it as such. The earliest of these cases is not farther back than Lord *Hardwicke's* accession to the great seal. The cases are only five in number, and only two of them can be considered as decisions against the effect of conditions precedent, viz, *Underwood v. (13) Morris*;

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(13) *Underwood v. Morris* seems to be no authority. *Vide per Lord Thurlow C. Jones*, 458.

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and *Reynish v. Martin*. Only one of them is pointed in distinct terms against precedent conditions, and Lord *Hardwicke*, in the other, does not name the authorities on which he relied, so that at last they seem to compress themselves into one fully pointed decision, and the opinion of one single Judge of Equity.

I do not mean to question, that Lord *Hardwicke's* opinion on the subject was gradually and deliberately formed; whether he had quite made up his mind, against exempting conditions precedent from the rule, at the time when he determined *Hervey v. Aston*, does not clearly appear, but he certainly was afterwards satisfied upon the point, which gives great weight to his opinion.

Sir *Joseph Jekyll* was also clearly of the same opinion, as appears by his judgment in *Hervey v. Aston*, as reported by Mr. *Forrester* (212); and some appearance of authority may be gathered for the same position, from the cases before the Revolution, but, according to my idea, those cases were decided upon as conditions subsequent.

The first case in favour of conditions precedent is that of *Popham v. Bamfield*, 1 Vern. 83., where Lord *Nottingham* says, "Precedent conditions must be literally performed, and this Court will never vest an estate, where by reason of a condition precedent it will not vest in law."

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[*] In *Bertie v. Lord Falkland*, 3 Ch. Ca. 129. 2 Freem. 220. and 2 Vern. 333., all the Court (Lord *Somers*, assisted by the Chief Justices *Holt* and *Treby*) held, 1st. That the condition being precedent, the estate never vested. 2d. That the case was beyond the relief of equity. The words of the two Lord Chief Justices, that the condition of marriage was precedent, are very strong. Lord Chief Justice *Treby's* words, according to *Vernon*, were these: "The condition, which is precedent, not having been performed, it is plain that the estate, by the letter of the will, is gone over to Lord *Falkland*." — He afterwards said, "They run upon a plain mistake, in saying that they come to be relieved against a forfeiture." — In another part he says, "It is not a case in compensation; it is not capable of an equivalent to answer the will of the testator." Lord *Holt's* words, according to 3 Ch. Cases, were these: "The estate was given on a condition precedent; and such is the nature of a condition precedent in point of law, that no action interposing can be a ground to relieve upon, if it be not performed; so that, being a condition precedent, though the Lord *Guildford* had died within the three years, and the condition had become impossible by the act of God, it could not have helped the lady. It will not be easy, in a court of equity, to show any precedent of relief in case of conditions precedent, as often happens in cases of conditions subsequent. Lord *Somers* also laid great stress on the condition being precedent. The case is of great strength: 1. It is a decision against a devisee, who was also heir-at-law. 2. The condition was a hard one. 3. The lady had shown a willingness to do all the delicacy of her sex would permit towards the performing of it. 4. It was a legacy of personal estate as well as a devise of land, and no attempt at a distinction was taken between them. 5. The great ground of determination was, its being a condition precedent, not the devise over, for it appears by *Freeman's Report*, that the Lord Chancellor did not hold a devise over essential, on a condition precedent. Another authority with me is *Creagh v. Wilson*, 2 Vern. 572., where Lord *Comper* founded himself on the greater legacies being substantially on a condition precedent. The case is, therefore, a direct authority, that if the condition of marriage be precedent, it wants not a devise over to make it effectual. The next is *King v. Withers*, Prec. in Chan. 348. Gilb. Ch. Ca. 26. The case shows Lord *Harcourt's* opinion, that where the condition [*] was precedent, and had not happened, he did not think the want of a devise over

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over material; and although the devise was of a portion out of land, no distinction was made in that respect. In *Gillet v. Wray*, 1 Pr. Wms. 284., Lord Chancellor *Cowper* held the condition not to be *in terrorem*; 1st, Because the provision was alternative. 2dly, Because the condition was precedent. In *Clerk v. Lucy*, 3 Geo. 1. Lord *Cowper* is said (5 Viner, 87. in the side note) to have expressed himself thus: "When the party cannot be compensated in damages, it is against conscience to relieve, and in *Fry* and *Porter's* case, the condition could not be compensated in damages, being a marriage without consent. Precedent conditions must be literally performed, and a court of equity will never vest an estate when, by means of a condition precedent, it will not vest at law. But as conditions subsequent are to divest an estate, there it is otherwise, where there can be a compensation made in damages, as above; but, in any other case, even in a case of condition subsequent, it is not so." *Holmes v. Lysaght*, 4 Bro. Parl. Ca. 103., arose on the additional legacy given on condition of marriage with consent; it is a direct authority for supporting a condition of marriage precedent, without a devise over, and in the case of personalty, for the legacy was primarily chargeable on the personal estate. The next authority is the great case of *Hervey v. Aston*, decided in 1737 or 1738, and first heard by Sir *Joseph Jekyll*, whose judgment is reported by Mr. *Forrester*, p. 212. He decided that the condition, which was precedent, was only *in terrorem*, both as to the portion out of land and the money-legacy. The case was brought by appeal, before Lord *Hardwicke*, who called in the assistance of the Lord Chief Justices *Lee* and *Willes*, and Mr. Justice *Comyns*. There is a full report of the arguments, in 1 Atkyns. Lord Chief Baron *Comyns's* argument is reported by himself. Mr. *Joddrel's* MS. contains the completest account of Lord *Hardwicke's* argument; and far the best account of the arguments of the Chief Justices, is in a MS. report which I have been favoured with by Mr. Serjeant *Hill*; Sir *Joseph Jekyll's* argument is against the effect of conditions precedent; nor will Lord *Hardwicke's* reversal make for me, as he decided on the distinction between land and money, and held the money-legacy to be governed by a reference to the portion. But all his Lordship's assessors were of opinion with me. Lord Chief Baron *Comyns* thought the condition effectual, as to the money-legacy, and relied on the case of *Creagh v. Wilson*, and his short note of the case in the [*] margin, makes the point determined a general one as to money-legacies, as well as portions, out of land. The Chief Justices concurred in thinking the precedent condition effectual with respect to the money-legacy, independently of its being mixed with the portion out of land. In *Mansell v. Mansell* (14), the Lords Commissioners held a precedent condition annexed to a power of jointuring to be effectual, and laid great stress on the general doctrine, as to conditions precedent. An expression of Lord *Mansfield*, in *Ambrose v. Ashby*, 4 Burr. 1929. 2 Black. Rep. 607., upon *Hervey v. Aston* being cited, his Lordship said, "That was a condition precedent, and, therefore, the estate never vested; and in Chancery it is held, that subsequent conditions of forfeiture, in restraint of marriage, are only *in terrorem*, unless there is a devise over." This amounts to an opinion that where the condition is precedent, it is effectual without a devise over. Another authority remains, from what fell from Lord *Loughborough*, in *Hemmings v. Munkley* (ante, vol. i. p. 303.). The words are few, but import an opinion that the condition being precedent was sufficient to make it effectual: I do not rest much upon it, because in fact there was a devise over before the Court, and it is not quite certain that the Court meant to decide independently of that circumstance. These are the authorities which oppose the doctrine of Lord *Hardwicke*, Sir *Joseph Jekyll*, and Lord Chief Baron *Parker*, and

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(14) See it stated, post. 173. S. C. Wilm. Ca. 36.

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though they were few, might justify your Lordship in over-ruling this determination. The balance is vastly in favour of the proposition, that where the condition of marriage is precedent, it is effectual in case of a money-legacy, without a devise over. Upon the whole, I cannot but suspect that Lord *Hardwicke* fell into a mistake on the subject, by supposing many of the cases to have been on conditions precedent, which really turned on conditions subsequent. Those cases are many in number, I will only refer to them in the order of time, *Yelverton v. Newport*, Tothil, 226., is the oldest case in Chancery on a marriage condition. *Pigot's case*, cited by Winch, Moore, 857., as a sentence of the Ecclesiastical Court. *Norwood v. Norwood*, 1 Chan. Rep. 121. *Vintner v. Pix*, 1 Chan. Rep. 121. Toth. 227. *Bellasis v. Ermine*, 1 Ch. Ca. 22. 2 Freem. 171. *Flemming v. Walgrave*, 1 Ch. Ca. 58. Anon. 1 Freem. 302. *Rightson v. Overson*, 2 Freem. 20. *Hicks v. Pendarvis*, 2 Freem. 41. A case put by Lord *Nottingham*, in *Jervois v. Duke*, 1 Vern. 19. Lord *Salisbury's case*, 2 Ventr. 365. 2 Vern. 22. Skin. 285. *Garret v. Pritty*, 2 Vern. 293. 2 Freem. 220. *Semphill v. Baily*, [*] Prec. in Chan. 562. In all these cases, although at first sight the conditions appear to have been precedent, yet on a closer view they were all considered as conditions subsequent: this will particularly appear by considering the case of *Bellasis v. Ermine*, which is considered as the leading case, for requiring a devise over, on a condition precedent, yet according to the authorities as they stood in the time of Lord *Hardwicke*, and to the strict language of the bequest, the condition is subsequent, there being an immediate legacy by the first words, and the condition following afterwards. This construction was given to a legacy of the same kind by Sir *Joseph Jekyll*, *Peyton v. Bury*, 2 P. Wms. 626. It is true in *Elton v. Elton*, 1 Ves. 4. (reported also in Mr. *Joddrel's MS.*) Lord *Hardwicke* would not allow legacies so expressed to be vested, though the legatee was a grandchild: but it is sufficient if the current of old cases considered them as vested, for if so, I believe it will be found, that the cases on which Lord *Hardwicke* formed his opinion, that the doctrine of *in terrorem* governs conditions precedent as well as subsequent, will be found to be cases of conditions subsequent, and, if so, it will leave Sir *Joseph Jekyll's* opinion alone in favour of the plaintiff.

2d. The second ground upon which I argue, that the present condition is effectual, is that the general residuary devise over is a sufficient devise for that purpose.

I admit that the authorities of Sir *Joseph Jekyll* and Lord *Hardwicke* are against me upon this point. The former in *Paget v. Haywood* (cited 1 Atk. 378.) denied to a general devise of the residue, the effect of a devise over. In *Hervey v. Aston*, Lord *Hardwicke* seems to have avoided deciding this point, but in *Wheeler v. Bingham*, he appears to have been of opinion, that it must be a special bequest, on failure of the event. There are also some earlier authorities the same way, as *Garret v. Pritty*, 2 Vern. 293. 2 Freem. 220. and *Semphill v. Baily*, Prec. in Chan. 562. Yet there are very strong authorities on the other side:—the first of these is *Lady Kilmorey's case*, cited by Lord *Nottingham*, in *Parker v. Parker*, 2 Freem. 29. A legacy of 1000*l.* each, to daughters, if they married with consent of a person named, and if they married without, they were to have only 500*l.* each, and the residue was given to the son. The [*] daughters being thirty years of age, sued in Chancery, for their legacies, but the court would not decree them without security given to refund, on marrying without consent. But this I confess is not a clear case, as to its being a residue and not a devise over, though it should seem the former. The next, *Amos v. Horner*, Eq. Ca. Abr. 112., is a complete decision upon a general residuary bequest. (15) A legacy to a daughter of

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(15) It seems, however, never to have been decided. See *Forr.* 215, 216. 3 Atk. 365.

100*l.* payable on marriage, with consent, or at twenty-five, and if she married without consent 50*l.* and no more, the residue to the defendant; the daughter marrying without consent, under twenty-one, Sir John Trevor held the devise of the surplus of the estate to be a devise over of the 50*l.* This case was refused as an authority by Sir Joseph Jekyll, because no decree was to be found in the Register's book; but Lord Chief Justice Willer, in *Hervey v. Aston*, said it appeared by the calendar that a decree was made, and it appears that he was of opinion that the residuary bequest was a sufficient devise over. Upon this contrariety of authorities, your Lordship will be justified in deciding this point according to the reason of the thing, and the real intention of the testator.

The nature of a residuary bequest is to vest in the legatee all the property of the testator not otherwise disposed of; therefore it is, that lapsed legacies of personalty fall into the residuum, which seems once not to have been allowed, *Sprigg v. Sprigg*, 2 Vern. 394., at least, if the legatee was dead at the time of making the will; but the doctrine is now settled in favour of residuary legatees, *Wright v. Hall*, Fortescue, 182. Therefore in *Durour v. Motteux*, 1 Ves. 320., Lord Hardwicke decided in favour of the residuary legatee, on a legacy void by the statute of mortmain.

The residuary bequest, in the present case, is in the fullest and completest terms possible; it extends both to the real and personal estate, and gives a particular reason for making her the *heres factus*, and universal legatory of his estate, subject to the former devises in his will. If the condition annexed to Mrs. Scott's legacy had been any other than marriage with consent, there could not have been a doubt, on its failure, of Mrs. Tyler's title, the intent being sufficiently clear; and if so, why should any stronger evidence of intent be required on a condition of marrying [*] with consent, than of living to a particular age, or any other contingency? But it may be said, that a special devise over effectuates a marriage condition, not by being an expression of intention, but by creating an interest in a third person; and this is Lord Hardwicke's method of accounting for it in *Wheeler v. Bingham*, 3 Atk. c. 367, but the residuary legatee is equally interested with any special devisee over. (16) In both cases the interest of the third person is equally at stake; the only difference is, that the interest of the one is created by general words, the other by a special limitation.

3d. The third point I made was, that this is not the case of a direct legacy, but of a trust. The Court will consider, whether, being such, it is at all within the sphere of the ecclesiastical jurisdiction. If it is not, the foundation on which the doctrine of *in terrorem* stands is wanting, and it becomes the subject of quite a different rule, under which land, portions out of land, powers over land, and money-legacies having a reference to a devise of land, are exempted from the doctrine. There was a case before Lord Hardwicke, of *Reddy v. Colson*, which I have referred to before, which went off, but Lord Hardwicke expressed a doubt, in respect to its being a trust, whether it was not exempted from the rule.

Upon the whole, Mr. and Mrs. Scott fail in making out their title to any part of the legacy of 10,000*l.*; Mrs. Scott having married under twenty-one, without the consent of her mother, which was made essential by Mr. Key's will. The only ground for avoiding the contingency is, that it is a condition in restraint of marriage, and therefore only *in terrorem*. In answer to this I have endeavoured to show that the doctrine is mistaken, or at most does not apply to conditions *precedent*:

(16) But see the references, &c. in the first note to this case, *antea*, p. 431., and 3 Ves. 196.

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that if a devise over is necessary to defend a condition precedent, as well as a condition subsequent, the residuary bequest amounts to such a devise over. Lastly, I have submitted whether a trust is not exempted from this supposed rule of the ecclesiastical jurisdiction; I have only to add, that the present case is favourable to the validity of the condition, as it comes from a father to a child; is exacted only whilst the legatee is under twenty-one; as the power is vested in the parent; that the power has not been abused, and it is not a case where the child loses her whole [*] provision, there being a considerable portion for her, which is not affected by the condition.

Mr. *Stainsby* (as *amicus curiæ*) referred the Court to the case in *Dyer*, 189. b. (*Butler v. Lady Bray*), which he said was cited in *Mansell v. Mansell*, by Sir *John Skynner*, then the junior counsel in the cause, and was thought so important by the Court, that the cause was ordered to stand over till the next day, in order that Mr. *Henley*, the Attorney General, might answer it.

Mr. *Plumer*, on the same side.—The question in this cause brings two points under discussion, 1st. The intention of the testator, independent of the authorities on the subject. 2d. The construction of the will upon the ground of the authorities.

The only question now is, as to Mrs. *Scott's* claim under the will; she stands in the light of a particular legatee taking this legacy out of the general fund; to do this she must show the intention of the testator in her favour, either by express words, or by implication. In the present case, it is not claimed as given in express terms; and it does not appear, by implication, that she was to have it, in the event which has happened of her being married under twenty-one, without her mother's consent. The legacy is given to an infant, twelve years of age; the testator had a son-in-law, and a grandson; and he gives to the present plaintiff other provisions, without any conditions, except attaining twenty-one years of age, by which she is amply provided for: a real estate of 150*l.* a-year, and a contingent interest in 5000*l.* given by the testator to *Dryer*, the grandson, on his dying under age, which is a very ample provision for a child under the circumstances of the plaintiff. The testator had not affixed any condition or restriction, as to marriage, to the gift of the 5000*l.* to his grandson, *Dryer*; but, when he was giving this 10,000*l.* to an infant, in augmentation of the fortune already provided for her, he might think it very reasonable to give it her with a restriction respecting marriage; it might be very detrimental to the daughter herself, not to be restrained in a matter of so much importance. The testator knew how to qualify his gift in the one case, and to leave it unqualified in another where he thought it unnecessary. In respect to this child he makes no disposition till she attains twenty-one years of age, then, in order [*] to entitle herself to the legacy, she must do one of two things; she must either postpone her marriage till twenty-five, or, if she marries under twenty-one she must do so with her mother's consent; this is a reasonable restraint, such as the law itself imposed upon her, and such as many celebrated writers think imposed upon her by nature. The whole devise is in one sentence; one moiety is to be paid to her at twenty-one, if unmarried, the other at twenty-five, if then unmarried. If the testator had made no further disposition, it would be clear that the legacy was not given absolutely, for she is not to take it unless she is unmarried; but he then says, (going upon the ground of the former prohibition,) that, in case she should marry under twenty-one, it must be with the consent of her mother. The condition he looked forward to was marriage; the first part of his will contains a prohibition of marriage till twenty-five; the latter lessens that restraint to twenty-one with consent. By marrying under twenty-one, without consent,

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she has departed from the lesser restraint, and disqualified herself from the additional bounty to which she had no title but upon performance of the condition. The only way the case can be argued in her favour is, that this restriction was not a condition, but a recommendation, because the legacy is not given over, and although it is given over in case of her dying unmarried under twenty-five years of age, that it is, not so in any other event; the construction that it was recommendatory, is not maintained by the will, it might as well be contended, that marriage itself was not necessary, as that it was not to be with consent. The principal intent as to marriage, was to postpone it till twenty five; your Lordship will not therefore admit that conjecture into the construction of the will. The assertion, that it is not given over on marriage without consent, is a mere fallacy founded on a supposition that whatever is not given away is given to the plaintiff, who is only a particular legatee; for, in truth, whatever is not given away goes to the residuary legatee. But they argue that being given to her in one event, it is not so in any other; which is a mistake, as Mrs. Tyler does not claim as a particular legatee, but as general legatee; therefore, if any thing is not disposed of from her it is given to her. It is by no means incompatible that it should be given to Mrs. Tyler, in case of the plaintiff dying unmarried, and also in case she should marry without consent, but to give it to Mrs. Scott, if she marries [*] without consent, is inconsistent with giving it to her on condition of marrying with consent, and would destroy a principal object of the testator's intention. Mrs. Scott is, therefore, not entitled to take on the ground of the testator's intention.

When I call this condition a restraint, I am probably wrong, for I may as well call it a condition in encouragement of marriage: if the condition had stopped in its first part, it would have been a restraint; for the plaintiff, in that case, could not have married until twenty-five, then permitting her to marry under that age, is an encouragement to marriage: but to say because it is a condition in encouragement of marriage, it shall be construed as an absolute gift immediately upon marriage, is not arguing justly. The condition annexed has nothing in it to engage a wish to set it aside. The intention of the testator is legal, imposes nothing but what the law itself imposes, it ought, therefore, to prevail; and, if it does, the plaintiff does not make out the proposition, that there is, in the event that has happened, an intent, either expressed or implied, that she shall take the additional legacy of 10,000*l.* given in the will.

Secondly, — Suppose the intent to be clear, that, in the events which have happened, the plaintiff is not entitled to take the legacy, the authorities ought to be very strong to induce the Court to contradict that intent.

All the authorities upon the subject are bottomed on the civil law.

In cases not within the ecclesiastical jurisdiction, the civil law has not been adopted as the rule, as in the cases of settlements of land, or of money to be raised out of land; in these, the condition has been held good; from whence it follows, that the condition, in its own nature, is just and legal, otherwise it must fail universally: neither is the rule adopted in the case pecuniary legacies, where there is a limitation over, or in the case where there is an alternative provision, where it only notifies the testator's intention. It follows, therefore, that where the intention is clear to the contrary, the rule does not apply. Another proposition also arises from the cases; the only ones which apply are those of money legacies upon conditions precedent. [*] If the doctrine laid down by Lord Chief Baron Comyns, and the Chief Justices, in their argument in *Hervey v. Aston*, is right, those even do not apply if the intention appear to the contrary, although there is neither a remainder,

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over, nor an alternative provision; this is expressly laid down by Chief Baron Comyns.

In adopting the rule of the civil law, your Lordship will enquire what that rule is; and it appears that it is not a deduction from principles, but merely a part of the *Lex Scripta*, the *Lex Papia-poppæa*. This rule makes the condition unlawful, and counteracts two principles adopted by our law; it makes the condition unlawful, which by our law is legal; and it gives the legacy, whereas our law annuls the legacy given on an unlawful condition. Will this Court adopt a part of the *Lex Scripta* of Rome, made under the particular circumstances of the times, against the clear principles of our own law? It was a part of this law, that a man who had but one child should take but half of a legacy. Will the Court adopt a part of the law, and reject the other? Where is the propriety of making a positive law of Rome, a rule of construction of a will here? How can it constitute a rule for discovering a testator's intention? Perhaps, however, after the determinations which have past, it would be presumptuous to say the Court should not at all refer to it. But if the Court feels itself obliged to consider it as a subsisting rule, as to those cases which fall within it, I trust your Lordship will not extend it further than it has hitherto prevailed; if the case before you could not, from its nature, be of ecclesiastical cognisance, or enter under that jurisdiction, the rule does not apply.

The present case is not a bill for the payment of a legacy; it is a bill filed for carrying into execution a trust; the legal fund is vested in the trustees; the Ecclesiastical Court cannot compel the execution of the trust, it can only give the legacy to the nominal trustee. The trust then is the subject of the appropriate jurisdiction of this Court; the bill is to compel the mother to dictate the words of the settlement, as to a moiety of the legacy, which the Ecclesiastical Court could not do; if they had attempted it, this Court would have restrained them by injunction. This appears from 1 Atkyns, 491., where it is laid down by Lord Hardwicke that, notwithstanding the original jurisdiction of the Ecclesiastical Court in legacies, yet, if there be a trust, this [*] Court will grant an injunction, *trusts being only proper for the cognisance of this Court*.

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The Court, therefore, in a matter of trust, is not bound by the rule of the civil law. This is the first case on the subject of a trust fund. In the case of land, or portions charged upon land, the rule has been held not to apply; so also it has been held in personal legacies under certain circumstances. Will your Lordship then conform to the general rule of this Court agreeable to the law of England; or adopt the rule of the civil law made under partial circumstances, when the question is which of these rules shall be applied to a new set of cases, upon which there is hitherto no determination?—But even admitting that the rule of the civil law is to prevail, the rule of that law would in this case not be to avoid, but to give effect to the restraint; the case here is that of a parent. The case, in the Roman law, is, the consent of a stranger, so it was also in the cases of *Underwood v. Morris*, and in *Reynish v. Martin*. The civil law required the consent of the parents in all marriages. Dig. 1. 1. 3. tit. 2. 1. 2. *nuptiæ consistere non possunt, nisi consentiant omnes: id est, qui coeunt, quorumque in potestate sunt*.—And it appears by Dig. 23. tit. 2. 1. 62. that the father might delegate this authority to the mother, and if she unjustly withdrew her consent, the prætor might compel her to give it, Dig. 33. tit. 2. 1. 19.—The restraint imposed here is, therefore, only of the same kind with that which the civil law recognised. It is limited to twenty-one, which is acknowledged by Swinburne, 153., to be good: “Albeit all these conditions are generally disliked, where they are in part restrained, as that the daughter shall not marry under twenty, the condition is not void.” The case there
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put is stronger than the present, there the restraint is absolute, here only to restrain without consent. The civil law would, therefore, give effect to, not control, the present restraint. The cases do not militate with this doctrine, many of them turn upon the special manner in which they are penned, several of them are upon conditions subsequent. In *Underwood v. Morris*, and *Reynish v. Martin*, the restraint is unlimited and given to strangers, the former of them is directly contradicted by *Hemmings v. Munkley*, and there is no one of the cases which, if all the facts are taken into consideration, contradicts the doctrine now laid down.

[*] Mr. Stratford on the same side. — This case has been argued on the part of the plaintiff, on the ground of two principles both drawn from the civil, and, as it is alledged, adopted by our law.

1st. That all conditions in restraint of marriage are void.

2d. That conditions, annexed to legacies, of marrying with consent are, where the legacies are not specifically given over, to be held *in terrorem* only, and not necessary to be performed.

With respect to the first of these principles, it is not to be maintained, taking it in a general, universal, and unqualified sense, but only when it is taken *sub modo*: and therefore in the same book in which it is said, "that all conditions against the liberty of marriage are unlawful," it is also added, "though, if the conditions are only such whereby a marriage is not altogether prohibited, but only in part restrained, as in respect of time, place, or person, then such conditions are not utterly to be rejected." Godol. Orph. Le. 45. c. 15. sec. 1. — The reason of which seems to be because none of these conditions impose celibacy upon the party altogether, and at all events, for though the marriage may not be had at this particular time, or place, or with this particular person, yet it may at some other, &c.

The question, therefore, in all these cases must be, whether the restraint imposed be reasonable or not.

In the present case, if the restraint be unreasonable, it must be so either as applied to the person to whom the power of restraining is given, or to the length of time for which such power is given. — As to the person, the power is given to the mother of the legatee; and as to the time, it can, in no event, continue longer than till the legatee attains the age of twenty-five years.

It were needless to state particularly the power which the *Roman* law gave to the parent over the child, in cases of marriage; many passages have been cited from the civil lawyers, and many more might be, to show that no marriage could stand without the previous consent of the parent, where there was [*] one, and the child was not emancipated: among others it is said in the Digest, *In tantum* (speaking of marriage) *jussus parentis præcedere debet*, but it is said that this authority resided in the father only, and not in the mother, and that it was part of the *patria potestas*. In answer to this it is to be observed, that the civil law, as it appears to be adopted in our ecclesiastical law respecting marriages, gives an equal power of consenting to the mother as to the father. Thus it is expressly decided by the Canons of 1603, that no children under the age of twenty-one, complete, should contract themselves, or marry without the consent of their parents (in the plural number) or guardians, and governors, if their parent be deceased. These are the words of the Hundredth Canon, and by the act of 26th of Geo. 2d. c. 33. it is expressly enacted, that the consent of the mother shall be as necessary as that of the father was, if the father be dead and there be no guardian.

The length of time during which the restraint may in this *individual* case last, does not much exceed the time given to parents by the act of the 26th of Geo. 2. *universally*. And though the testator has, in this case, by his will, mentioned a time, *viz.* the age of twenty-five, to

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the extent of which the marriage of the legatee might by possibility have been restrained, yet he has by the same will, held out inducements to an earlier marriage, provided it be a marriage with consent, and he has not impeded any marriage whatever after the age of twenty-five years.

There is no case to be found, in which it has been said what should be a reasonable restraint in regard to the time it is to continue. But from what is said in *Aston v. Aston*, 2 Vern. 452., it should seem that though no time be limited, the restraint is not unreasonable, that is, so as to avoid the condition.

If the legacy, in this case, had been given to the legatee at the age of twenty-five years, *if she was then sole and unmarried*, it would at least have been questionable, whether by such a bequest a certain character and description of person was not imposed upon the legatee, which it would be necessary for her to sustain at that age, and without which she could not be intitled; and [*] yet, in such a case marriage, would be as much impeded as in the present. In this view of the case, another ground of argument arises on the part of the defendant; in the common case of a legacy of personal estate given to a person at twenty-one, it was expressly said by the Court, in pronouncing judgment, in *Dewees v. Killet*; (*ante*, vol. 1. p. 123.) it makes such a description of the person, that if the person does not sustain the character at the time, the legacy will fail. I do not cite this case as being in point to the present, (though that was a case upon a personal legacy, whether vested or not) but merely for the passage alluded to in the judgment, which was pronounced on consideration.

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If it be true, then, that the words of the bequest do in this case describe the qualification and character of a person under which the legatee is to take, a condition arises which, according to what is said by Lord Couper in the case of *Creagh v. Wilson*, 2 Vern. 572., is in the nature of a condition precedent, and must be performed before the legatee can be intitled. To what is said by Lord Couper in this case of *Creagh v. Wilson*, may be added what is said by the Lords Commissioners *Willes* and *Wilmet* in the case of *Mansell v. Mansell* (17), (24th February 1757,) which case seems much in point with the present one, as to the principle at least upon which the question now to be stated was determined. — The case was this.

Sir *Edward Vaughan Mansell* being seised in fee of lands, &c. by his will devised, as follows :

"I give and devise all my estates, lands, tenements, and hereditaments, to my wife *Mary Mansell*, for ever, and will that she shall be directed and governed by *John Vaughan, Esq.*, and *Morgan Davis, gent.*, and their heirs, in the management of her concerns; whom I appoint and institute trustees of this my will, to act for her and my children's interest, as hereinafter mentioned; and after my wife's decease, I give and devise all my lands, &c. to my son *Edward Mansell*, for the term of his natural life, and I will that he shall be capable with the consent of the said trustees, to settle a jointure on the woman they agree to in writing he should marry, and from and after his decease to his first and other sons, &c."

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[*] There was also in the will the like limitation to *Rawleigh Mansell*, the testator's second son, with remainder to his first and other sons, &c. and the same power of jointuring.

The testator died in 1720, leaving his eldest son, *Edward*, thirty years of age and married: and the trustees were sixty years old and upwards.

In the year 1740, the lady of Sir *Edward Vaughan Mansell*, the devisee for life, being dead, and the trustees also being both dead, *Davis* being the survivor, and leaving a son and heir-at-law, *Edward Mansell*,

(17) See Lord C. J. *Wilmet's* Report of it. Case and Opinion, 86.

then Sir *Edward Mansell*, and who was at that time a widower, married Lady *Mansell* (the plaintiff in the cause) and by deed settled the whole estate devised to him by his father's will upon her, by way of jointure, without any consent obtained of the heir of the surviving trustee.

Sir *Edward Mansell*, the plaintiff's husband, died afterwards without issue, and, upon his death, the defendant in the cause, who was the eldest son of *Rawleigh Mansell*, was the remainder-man in tail of the estates in question, but the plaintiff entered upon the estates under her jointure; and the bill was brought by her for confirmation of her jointure, and for delivery of some deeds. And one of the questions made, and much agitated in the cause, was whether the want of consent of the heir of the surviving trustee to the marriage and jointure was matter of circumstance only, and the Court should aid the execution of the powers, as being defective, or not.

Lord Commissioner *Willes* said, "I observe the counsel on both sides have considered this consent as a condition. By the defendant's counsel it has been argued as a condition precedent, by the plaintiff's as a condition subsequent. I think if it is to be taken as a condition, it must be a precedent one; and, not being performed, no estate could arise. The trustees were not only to consent to the marriage, but to the *quantum* of the estate, and, therefore, there are two conditions and both precedent."

Lord Commissioner *Wilmot* — "Such an act as attends this power must be in the nature of a condition precedent, I have no idea of a condition annexed to a power being subsequent, the condition [*] must be performed before the power can take effect. — All powers arise out of the original freehold; and the person who takes under a power takes from the original grantor in the power, but such taker must bring himself within the description to enable him to take. And it is plain without cases, that when a person claims by *designatio personæ* he must verify the description."

Mr. *Mansfield* puts this as the case of a vested legacy. If it had been given to the legatee, without the intervention of trustees, he might perhaps have argued that it did come within the cases of legacies vested, though to be paid in future. But here nothing is given immediately to the legatee, but to the trustees, and they are directed "to pay and transfer," as it seems to me, to one of two persons, at a certain time, and on certain events, *viz.* when the legatee shall attain the age of twenty-five years, to her, if unmarried, or if married with consent; but if not married with consent, to her mother.

With respect to the second of the principles mentioned, *viz.* That conditions annexed to legacies of marrying with consent, where the legacies are not specifically devised over, are to be held *in terrorem*, and not necessary to be performed, I consider the circumstance of there being or not being a devise over, as a ground of presumption only of the intent of the testator, and not a necessary and invariable rule of itself. And this will appear to be so, by considering the rule, as far as it may be called one, and the principles on which it has been adopted. The rule is laid down in the case of *Stratton v. Grymes*, 2 Vern. 357., where it is said that a devisee-over being named, he must be looked upon as a person whom the testator considered, and had in his thoughts, as to what provision he was to have by his will; but where there is no devise over, the condition shall be held *in terrorem* only, because, as it is said by Sir *Joseph Jekyll* in the case of *Hervey v. Aston*, though a daughter marries without her father's consent, yet it is not to be supposed that his severity, if living, would carry him so far as to leave her quite destitute.

As to the rule itself, as laid down in *Stratton v. Grymes*, Lord *Harcourt*, in observing upon it in the case of *King v. [*] Withers*, Prec. Chanc. 350. says, it is too wide. And as to the reason given by Sir *Joseph Jekyll*,

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Jekyll, if it be the true one, it does not apply to the present case; for, in this case, the daughter is not only not left destitute, but is provided for otherwise; and where that is the case, the rule has been held not to apply. *Gillet v. Wray*, P. Wms. 284. Upon authority, therefore, as well as principle, if the legatee be otherwise provided for, though there be no devise over, the legatee must fulfil the condition or forfeit the legacy.

But it is said, that there must not only be a devise, but a specific devise over, in order to disappoint the legatee, and that a devise of a residue will not do. It is possible that the precise meaning of the word *specific*, as applied to a devise over, is not sufficiently attended to; but it should seem that where the devise over, though of a residue only, be to a particular person, that in such a case, the word *specific* applies at least as much to the person to take, as to the thing given; indeed otherwise, the rule as laid down and reasoned upon in *Stratton v. Grymes* is hard to be understood.

In this case, the residue is expressly given to Mrs. Tyler, *nominatim*, accompanied with strong words of regard. It might have been different had Mrs. Tyler been appointed executrix, and the residue had fallen to her as such. But here Mrs. Tyler seems to be the person whom the testator considered, and had it in his thoughts to provide for *specifically*, next after his daughter, and in case his daughter should not comply with the terms of marrying with the consent of her mother, if she thought proper to marry at all before she was twenty-five years of age, or continuing unmarried till that time.

Mr. Madocks for the defendants, the *Hankeys*; — by their answer the bankers say that they were bankers to Mr. Key, and that various securities for money were deposited by him in their custody, but were locked up in a box, to which they had no key: that *Elizabeth Tyler*, the defendant, also deposited with them securities locked up in a box, to which also they had no key, and knew nothing of the contents, till her necessities required money, when she deposited the bonds in question, as a general security. They deny the knowing any thing of the [*] contents of Mr. Key's will, and they claim a right to detain the securities deposited by her till they are paid their debt.

An executor, being entitled to the property of the testator, if he sells it fairly, the Court will sustain the purchase, and there is no distinction as to this, between its being a specific or a pecuniary legacy, *Crane v. Drake*, 2 Vern. 616. was a purchase in collusion with the (18) executors. In the marginal note of 18 Viner, 121. it is said that case was cited by the Lord Chancellor in *Nugent v. Gifford*, who said he had examined the register book, and the decree was founded upon particular proof of fraud. *Nugent v. Gifford*, 1 Atk. 463. and *Mead v. Lord Orrery*, 3 Atk. 285. both show that the possession of the executor is a sufficient title to justify the purchasers. *Bonny and Ridgard* turned merely on the circumstances of the case.

Lord Chancellor. — It is clear the purchaser may be affected with fraud; the only question is, what evidence will be sufficient to prove it. It is difficult to reconcile *Crane v. Drake* with *Nugent v. (19) Gifford*, which seems to be a payment of the executor's debt with the testator's property, which he could not have paid any other way.

Mr. Mifsford on the same side — The Court is very cautious as to throwing difficulties in the way of alienation by the executors. Lord

(18) *Vide post*, 4 vol. 137., and 17 Ves. 162, 163.

(19) But see in *Macleod v. Drummond*, per Lord Eldon C. 17 Ves. 161, 162, 163, &c. who observes, that in the one case there was notice of the plaintiff's debt; in the other there was not. See Lord Eldon's observations upon the various cases and the points of law, 17 Ves. 157, et seq.

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Hardwicke in *Mead v. Lord Orrery* said; he did not know of any instance where an assignment by an executor had been set aside, unless some fraud appeared between the executor and assignee.

It is said that *Bonny v. Ridgard* has overturned the doctrine of *Mead v. Lord Orrery*. This last case was an assignment which could not be in the execution of the executor's trust; it was an assignment to a Master in Chancery, as a security for accounting as a receiver. In *Bonny v. Ridgard* there were considerable circumstances to show that the assignment of the equity of redemption was not with perfect fairness. But his Honour's observations cannot have the weight of overturning the decision of *Mead v. Lord Orrery*. The money might have been borrowed by *Ridgard* for the purposes of the trust. In *Mead v. Lord Orrery* no money passed: the case is a very strong one [*] and goes infinitely beyond this. In *Humble v. Bill*, 2 Vern. 444. *Bill* having a term in a printing office, devised that 2000*l.* should be raised out of it for his daughter, and made *Garret* the executor; *Garret* mortgaged the printing-office, and it was afterwards assigned to Sir *William Humble*. The Court was of opinion that the executor had a power to alien or sell, and decreed in favour of the alienation; and, although this decree was reversed in the House of Lords, yet it appears from Mr. *Brown's* report of it, *Savage v. Humble*, 1 *Brown's Parl. Cases*, 71., to have been upon the ground of some fraud which is not stated in the abridgement of the case, and it is always treated as a case of fraud. The case of *Crane v. Drake*, turned merely upon the fraud. The case of *Nugent v. Gifford*, is very like that of *Crane v. Drake*, only in the latter, no fraud was attributed to the transaction. In the present case Mrs. *Tyler* appeared to be owner of the whole. It is not the practice of men in general to look very nicely into the title of chattels; it is the confidence reposed by the testator in the executor, that enables him to dispose of the property; other persons in dealing with him rely upon that confidence, and it is looked upon by courts to be more hurtful to the community, to encourage a dread of dealing with executors, than to permit the private loss where they have disposed improperly. The principal doubts in the present case arise; first, from the property being specifically bequeathed; secondly, from there having been no formal assignment of the *River Lee* bonds. First, in *Bonny v. Ridgard*, the property was specifically bequeathed. And it appears by *Ewer v. Corbet*, 2 P. Wms. 148. that this is not material. That the executor may sell a term, and the specific devisee has no remedy against the purchaser, but against the executor only. In *Bill v. Humble* there was a specific charge, but that was not made a point in the case. Secondly, as to the security not being actually assigned. — This is in the nature of a mortgage, according to the act of parliament the security is to pass by assignment, endorsed on the bond, and entered in the company's books. The *Hankeys* would have a right as against the executrix, to call for this formal assignment. In *Russel v. Russel* (*ante*, vol. i. p. 269.) before the Lords Commissioners, a lease being deposited as a security, the Court was of opinion that the contract was executed by the delivery of the lease, and that the pledgee had a right to a conveyance. In [*] *Nugent v. Gifford* (from a MSS. note) it was impossible it could be for the purposes of the trust, and it was objected that *Nugent* took the property with knowledge of its being the testator's, and, therefore, was a party to the *devastavit*; but the Lord Chancellor said, if it was fairly done, its being for money *bond fide* due was as good a consideration as for money paid; the mere knowledge of its being the property of the testator is not sufficient. In *Nugent v. Gifford*, it was an equitable assignment only, and it was held, the plaintiff had a right to an assignment. Under the circumstances of the present case, Mrs. *Tyler*, as executrix, if there were debts, might assign this property.

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party for payment of them. The *Hankeys* were bankers both to *Key* and her; there was no fraud in them, so, if they were plaintiffs instead of defendants, they would have a right to call for an assignment; even supposing there to be a prior equitable title in Mrs. *Scott*, they have a prior legal title, having the possession of the securities, and might, therefore, keep them till an action should be brought, which could only be by Mrs. *Tyler*, who could not recover against her own acts; the Court will not therefore take from them the possession of the deeds. In *Head v. Egerton*, 3 P. Wms. 279. a second mortgagee having the title deeds in his possession, the first mortgagee cannot compel him to deliver them up without paying him his mortgage money, and Lord *Talbot* considered the second mortgagee's claim as arising merely from having the title deeds.

Lord *Chancellor*.—If I understand the case, it stands thus: that upon the death of the testator, the property vested in the executrix. She might have vested it in a legal manner in the defendants, but she only left the securities in their hands; if so, they have as fair a mortgage as any one has who has only an irregular mortgage.

Mr. *Mansfield* in reply.—I shall endeavour to take notice of the several heads of argument under which the gentlemen of the other side have arranged the questions in the cause. 1. The first question is that made on the will, and it is whether this gift to the plaintiff, Mrs. *Scott*, is, or is not, a simple gift of the money in one or two events; or she was, at all events, to have the money in case she married. The first gift in the will is [*] that to *Dryer* of 5000*l.* payable when he should attain the age of twenty-one; if he should die under that age, it was to be divided between the defendant *Elizabeth*, and the plaintiff, *Margaret, Christiana*: and if the latter died under twenty-one, it was to go wholly to the defendant, *Elizabeth*. Then comes the bequest upon which the question arises; he directs his executors to purchase 10,000*l.* *South-sea* annuities, and gives a direct order that the interest (except the 100*l.* a-year maintenance) should accumulate until the plaintiff should attain her age of twenty-one years; then the accumulation was to stop, and half of the stock, and all the savings were to be paid to her; and, at twenty-five, the other moiety was to be paid. Then comes the provision for her marrying under twenty-one, and the gift of the stock over to the mother, in case she should die under twenty-five, unmarried. He then proceeds to give her the houses at twenty-one, and if she dies under that age, he gives them to *Dryer*, and then to the *River Lee* bonds, which he gives to the plaintiff at twenty-one; and if she dies under that age, he gives them to the mother, the defendant, *Elizabeth*. He afterwards gives several legacies, and gives the residus to the defendant, *Elizabeth Tyler*.

It is a mere blunder by which the legacy is made to vest at twenty-five, he understands and means that she shall have it at twenty-one, if married; but, if married before twenty-one, with consent, he meant to accelerate it; and that she should not, in that case, wait till she attained twenty-one. The provisions as to twenty-one and twenty-five, are a restraint of the precedent gift of the moiety and savings at twenty-one, at which age he gives her every thing else; the houses, the *River Lee* bonds, and the contingency in *Dryer's* legacy of 5000*l.*

If this be the fair construction, there is no pretence to say the legacy is forfeited by the marriage. The gentlemen on the other side have fancied them different provisions at different times; but this is wrong, for by their construction, if the plaintiff married at seventeen, and died under twenty-one, even leaving children, she would transmit nothing to them. There is no arguing against the words of the will. The 10,000*l.* is the only thing given as a portion, out of that alone, her maintenance is to arise, out of the other funds she is to derive [*] nothing till twenty-one;

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one; this is the reason, that in disposing of them, no reference is made to her marriage. They have studiously avoided taking any notice of the remainder over, which is simply in the event of her dying unmarried. This is a ground for deciding against them: the only shift they have been able to find, is to construe it *so unmarried*, which will be to contend, that dying married without consent, is dying *unmarried*. The clause of dying unmarried is at twenty-five. It will be a new construction, that this signifies the same thing as unmarried under twenty-one: it shows they are sensible of the efficacy of that clause. All the argument from the bequest over, is therefore in full force. He could not mean what he has expressed; for, as half was to vest at twenty-one, the whole could not go over if she died between that age and twenty-five. He could not mean her situation to be worse if she married between twenty-one and twenty-five, than she was at her arrival at that age: but it is contended, she is only to take in the events pointed out. But the restraint being confined to twenty-one, he could not mean her provision should be less upon marrying without consent, between twenty-one and twenty-five, than if she married without consent under twenty-one. The mistake is obvious, it arises from the insertion of twenty-five instead of twenty-one. If twenty-one had been inserted, it would have been clear she was to have her whole fortune upon marriage after twenty-one; or, upon marriage before twenty-one, with consent.

In the present case there are no negative words; it is, in that respect, not like *Reynish v. Martin*; there the gift was upon marriage with consent, and not otherwise; but here there are no words, nor a tittle to show an intent to deprive her of the legacy. On the fair construction, therefore, of the will, according to the true intent of the testator, if she was married, she was to have the whole at twenty-one, and the provision in restraint of marriage, is, as such, *in terrorem* only.

If, however, the testator has expressed himself so imperfectly that she is obliged to get rid of the objections which have been raised to the legacy, we must consider what has been said on the several points.

[*] 1st, I have always understood the point to be established, that there is no distinction between conditions precedent and conditions subsequent, except with respect to lands, or where there was a devise over, and that in all other cases a condition in restraint of marriage was void. It is not very pleasant to find that this is a mere distinction of authority, not of reasoning, and that children are not, in all reasonable cases, bound by the authority of parents and guardians. In reasoning, subsequent conditions ought just to prevail as much as precedent ones. But the doctrine is established, and it is too late to correct it, at least with respect to subsequent conditions. But it is said on the other side, that though this be the case with subsequent, it is not so with precedent conditions. And with a reference to some of the cases, the intention of the testator has been talked of, and Mr. Plumer has argued, that wherever the intent of the testator appears, that shall be the rule, but, in the same breath he says, a subsequent condition shall not prevail, although there can be no doubt but a subsequent condition speaks the intention of the testator, as strongly as a precedent one can do. It is contended, however, that the authorities are different as to precedent conditions: but the authorities put precedent conditions out of the way as much as subsequent ones. The doctrine is adopted from the civil law.—They contend the civil law has been misunderstood, and that we are now to give it a new construction. But if there is any error in the manner in which the civil law has been construed, the time for correcting that error is past, the doctrine is now established too strongly to be moved, it has become the law of the Court, and the question only can arise, how it has been understood and adopted. It is of no avail to understand it

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better than those who adopted and established the rule have done. But, in fact, the civil law does not admit the distinction between precedent and subsequent conditions; what is the difference taken on the other side between these conditions? that precedent conditions are favoured and must prevail, that subsequent ones must be rigorously construed as to their validity, and may be dispensed with where compensation can be made. At law, there is no distinction between conditions precedent or subsequent, if the subsequent condition is broken. If a legacy be given to *A.* if he marry with consent of *B.* there is no distinction whether in point of form it be a condition precedent or subsequent: and equity has nothing to [*] do with the condition. There can be no compensation, and therefore there is no distinction between them as applied to this subject. If it is so applied, it is arbitrarily to create a law for the purpose.— But it is admitted on the other side, that a subsequent condition is void.— There is no argument for a subsequent condition being void, that will not equally apply to a precedent condition being void also. A great many cases have been cited as to the distinction which I shall not go through; *Creagh v. Wilson*, and *Amos v. Horner* (20), were clear cases of alternative provisions, and in each of them there was a remainder over. There is not one of the cases where a precedent condition prevailed. *Hervey v. Aston*, is that which has been the most relied upon, as favouring what has been contended for on the other side. It is not easy from Lord Chief Baron *Comyns's* argument, to determine what his opinion was, but I think it may be gathered, that he thought both the precedent and the subsequent condition void. But what was the decision and the ground of it in that case? That it was the case of land, and, therefore, the gift could not take place till the condition was completed. I never yet knew any other conclusion drawn from that case, but, that it was so distinguished from the case of personal property. But how came Sir *Joseph Jekyll* to decide in that very case, that the condition was void? How came Lord *Hardwicke* or Lord *Somers* to doubt whether such a legacy was to take place when the condition was not complied with? They must have understood, that a condition in restraint of marriage was, in general, void, but doubted, when it was to arise out of land, whether the distinction was to prevail, or was to yield to the ecclesiastical rules. These are the principal authorities referred to by the other side, for, I shall not dwell on the opinions of commentators on the civil law, which is a lamentable way of collecting what that law is.—

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On the other side we have very express authorities; from *Godolph. Orph. Leg. c. 15. p. 45.* it appears that such a condition, though precedent, is void, and this is confirmed by the passage from the *Digest*, cited there. In the cases of *Reynish v. Martin*, *Underwood v. Morris*, and *Elton v. Elton*, the point is treated as perfectly settled, that there is no such distinction. In *Amos v. Horner* (20), the decision proceeded on the remainder over, not on the condition being precedent, I may add *Gillet v. Wray*, where the condition was held good, but that was on account of [*] the alternative provision. *Bellasis v. Ermine*, was clearly a condition precedent, and the Court was of opinion that it was only *in terrorem*. In *Holmes v. Lycet*, 4 *Brown's Parl. Ca.* 103. The counsel in their reasons expressly state, that in a legacy of personalty there is no distinction between conditions precedent and subsequent. *Underwood v. Morris*, is said to be impeached by *Hemmings v. Munkley*, but the point determined in the latter did not apply to that case. Lord *Hardwicke's* authority on this subject has every circumstance possible to give it weight; *Reynish v. Martin*, was late in his time, and was determined

(20) There was no decision in *Amos v. Horner*, *Fort.* 215, 216., and 3 *Atk.* 365.

upon

upon great consideration. He had the strongest aversion to inconsiderate marriages, and after again and again considering the subject, he decided that point in that case, as an established rule in this court. If the cases are such as I have stated them, it is now too late to discuss any thing but what the cases are.

2. It has been endeavoured on the other side to bring in the devise over, and they have argued that being given to the plaintiff in three events, that in all others the legacy goes to Mrs. Tyler. A devise over exists only where there is a gift to one if he marry or do any other act; with a gift, if he does not, to another person; a residuary bequest does not amount to a devise over. There is no devise over here, but what there is in every case where there is not an intestacy. The case of *Stratton v. Grymes*, 2 Vern. 357. shows that a devise over is only a gift to A. in one event, in another to B. Where B. has as good a claim in the latter event as A. has in the former. As to a residuary legacy being a devise over, it cannot be in such a case as this, where it is given over only in one certain event, that of the daughter dying unmarried under twenty-five. And the legacy being expressly given over to Mrs. Tyler in that event, it is absurd to say it is given over to her in another event, and in a different character. A general residuary legatee has never been considered as a devisee over of a particular legacy.

They then contended, that here is an alternative provision.—But the testator has said no such thing—the other gifts are without any reference to this legacy of 10,000*l.*; if the plaintiff had died under twenty-one, she would according to their argument have had nothing, for none of the other gifts vested before that time. There is not the least ground to say that here is an alternative [*] within the meaning of *Gillet v. Wray*, where one thing is given in one event and another in another event.

Another ground of argument has been, that the restraint is only till twenty-one, though there is a passage in *Swinburne* where a restraint to twenty is said to be good, it is only given as his opinion. And although the point might have occurred in two or three of the cases as *Amos v. Horner*; and *Creagh v. Wilson*, where the restraints were only temporary, yet it was not insisted upon in those cases, and although the restraint in *Underwood v. Morris*, was only till twenty-one, yet the condition was held void, and not a hint given that the circumstance of its being confined in point of time would make any difference.

Another circumstance introduced to vary this case was, that here the restraint was given to a parent. In the civil law the mother could not be considered as a parent. Is there any possible distinction to be taken between a parent and a guardian? The law makes no such distinction and reason and common sense agree in this with the law. In *Hervey v. Aston*, the consent first required, was that of the mother, but no distinction was made on that ground.

The objection that this is a trust, is also perfectly new; If there is any ground for this distinction, another case must be added to the exceptions upon this subject, that a condition in restraint of marriage annexed to a legacy given in trust for the legatee, will be good, though if the legacy be given immediately to the legatee it will be void. And this is a distinction expected to be adopted in a Court which says, that trust estates follow the nature of legal estates. Although the ecclesiastical court has not, in general, a jurisdiction over trusts, it is by no means clear that that Court may not compel the executor to pay the legacy to the party actually entitled, and, where the executor is himself the trustee, that Court may undoubtedly compel him to pay it, as he in that case only is, what he is in all cases, a trustee for the legatee. Upon the true construction of this will, I therefore contend Mrs. Tyler was not to have this legacy, if Mrs. Scott married.

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The next question is, with respect to the River *Lee* bonds; under the authorities which have been cited, I contend the [*] bankers have no right to detain them. The bonds are themselves assignable by special form, and, appearing to be Mr. *Key's*, Mrs. *Tyler's* property appears to be in the character of his executrix, as she has them under no assignment, she deposited these with other securities for money, with the bankers, as a security for the money advanced. It is clear, therefore, the bankers knew they were dealing with Mrs. *Tyler*, as executrix of Mr. *Key*. They lend her money as a trader, not for the purposes of the trusts of the will—This is not an ordinary way of dealing with executors. If an executor sell the property of the testator, the purchaser is not bound to take notice of the application of the money; but where an executor deals in this way, it is incumbent on the party dealing with him to be cautious.—It is not usual for an executor to mortgage the testator's property, but where an executor enters into a trade, and deposits securities belonging to the testator, as a security, it is incumbent on the party dealing with him, to enquire, whether it is specifically bequeathed. *Crane v. Drake*, goes further, for that was the case of a creditor, and the person dealing with the executor was obliged to answer to the creditors; and, although in *Nugent v. Gifford*, Lord *Hardwicke* held the mortgage was good, yet there is a distinction between a creditor and a specific devisee, as the party may know, by looking into the will, whether the property is specifically bequeathed.—Executors will neither be endangered nor much trouble given to persons dealing with them, if they are bound to enquire whether the property is specifically bequeathed.

There is no case precisely in point of an executor, but there is one which bears considerable analogy; a factor (even in a commission *del credere*) though he has a complete power to sell, cannot pledge the goods of his principal for his own debt. If a person to whom the factor is indebted takes the goods he shall answer to the original owner.

Here the *Henkeys* could not but know they were dealing with Mrs. *Tyler* as an executrix, with respect to these bonds.

The cause stood over till this day, when it came on for judgment.

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[*] Lord *Chancellor* (after stating the case as above) delivered his opinion to the following effect. (20)

Upon this matter two questions have arisen; 1st, Whether as this case stands, the plaintiffs have any, and what, interest in the 10,000*l.* *South-sea* annuities. 2. Whether the bankers are entitled to hold the bonds as a security for the money due to them from the bankrupt.

The testator makes four bequests to his daughter, a contingent interest in 5000*l.*, the 10,000*l.* in question, the freeholds, and the River *Lee* bonds, all upon her living to twenty-one married or unmarried. If she dies before, the 1st, 3d, and 4th take no place. Yet the interest of the fourth is to be paid to her separate use during infancy, notwithstanding her coverture. The 2d bequest may take place before twenty-one, by marriage with consent of her mother.

I suspect that the testator has failed of expressing his full intention concerning the 10,000*l.* He gave it to his daughter on a double contingency: he seems to have meant it for the mother, on failure of them. But he hath given it over to her also, on another double contingency, the death of the daughter before twenty-one, unmarried.

The main argument of the plaintiff turned on this position, that one branch of the contingency implied a condition in restraint of marriage,

(20) See the judgment from Lord *Thurlow's* own notes, *verbatim*, in 2 *Dipk.* 721; *et vide per M. R.* 3 *Meriv.* 118., *et antea*, 431 note (1).—Upon the various cases, and the law as it now stands, see some of the latest, which are referred to in the preceding note.

which is merely void, and the legacy absolute; and many cases were cited in support of it: but the cases are so short, as to afford no distinct view of the principle on which the rule is laid down.

The early cases refer in general to the Canon law, as the rule by which all legacies are to be governed.

Towards the latter end of the last, and beginning of the present century, the matter is more loosely handled: the Canon law is not referred to, as affording too positive a rule, but these conditions are treated as partaking of the force allowed them by the law of *England*, but at the same time as unfavourable to the good order of society: at length it became a common practice [*] that such conditions were only *in terrorem*. I do not find it was ever seriously supposed to be a testator's intention to hold out the terror of that which he never meant to happen: but the Court has made such conditions amount to no more. Provisions against improvident marriages during infancy or to a certain age could not be thought an unreasonable precaution for parents (21): the custom of *London* has been found reasonable.

About the middle of the present century, doubts arose which divided the opinions of the first men of the age. The difficulty seems to have been in reconciling the cases.—The prevailing opinion was, that devises of lands should follow the rules of the common law; and legacies of money the rules of the Canon law.

The question remains unresolved, what is the nature and extent of the rule.

An injunction to ask consent is lawful, as not restraining marriage generally. A condition that a widow shall not marry is not unlawful.—An annuity during widowhood—A condition to marry, or not to marry, *Titus*, is good.—A condition prescribing due ceremonies, and place of marriage is good—still more is a condition good which only limits the time to twenty-one, or any other reasonable age, provided it be not used evasively, as a cover intending to restrain marriage generally.

It is agreed on all hands that (however restrictive of marriage) when the legacy is given over to other uses, the testator shall be deemed to regard those uses.

The case of *Underwood v. Morris*, by Baron *Parker*, for the Chancellor, does not appear to have been closely considered. I agree with the late Lords Commissioners in denying the authority. (22)

It was not contended on the part of the daughter, that if the bequest had been when at twenty-one or twenty-five in case she was unmarried, without more, that she could have claimed the legacy; but, because the mother was empowered to accelerate the gift by consent, it is argued to be, indirectly, an illegal restraint of marriage.

[*] *I am of opinion that the daughter, having married at eighteen, improvidently (as far as appears) and against the anxious consent of the mother, never came under the description to which the gift of the 10,000*l.* South-sea annuities was attached: it is therefore void, and part of the residue, and belongs to the assignees of the mother.* (23)

Lord Chancellor was proceeding to give judgment on the second point, respecting the bonds (24); but was interrupted by the Solicitor General, who informed him the parties had come to a compromise.

(21) *Vide* 2 Dick. 721., 3 Ves. 89, 95, 96, 97, &c.

(22) See in *Hemmings v. Munckley*, ante, 1 vol. 304.

(23) See per Sir W. Grant M. R. in *Lloyd v. Branton*, 3 Meriv. 118. *Vide* also *Hemmings v. Munckley*, ante, 1 vol. 303, 304.

(24) As to Lord Thurlow's opinion in this case, *vide* in *Andrew v. Wrigley*, post, 4 vol. 129. See also that decision, *Hill v. Simpson*, 7 Ves. 152, &c., and *Macleod v. Drummond*, 14 Ves. 355., and 17 Ves. 152, &c.

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[*] HILARY TERM.

29 Geo. 3. 1789.

STRATTON against HALE.

(No Entry.)

Money of the wife's, by settlement, to be lent to the husband on bond at 5*l.* per cent. and no interest paid till he should decline trade, then the interest to be paid him for life, remainder to the wife, remainder to the children; husband becomes bankrupt, the assignees are entitled to the interest of the dividends during the life of the husband.

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BILL by the assignees of *Yeates*, a bankrupt, to be decreed to be entitled to the interest of the dividends laid out by the trustees under the following settlement, during the life of the bankrupt.

By indenture bearing date 23d and 24th of August 1772, real estates were settled upon certain trusts therein contained. *Mary Osborne*, the intended wife, being entitled to a sum of 4000*l.*, it was to be paid to three trustees, in trust to advance the same to *Yeates*, the intended husband, on bond, at 4*l.* per cent., no interest to be paid till he declined trade, if he declined trade the interest to be paid to him for life, remainder to the wife for life, remainder to the issue of the marriage. — The 4000*l.* was lent to *Yeates*, on bond payable six months after date. In 1782 a commission issued against *Yeates*, who with his wife and two children are still living, and the bankrupt has obtained his certificate. Two dividends have been paid to *Blagden* and *Hale*, and have been laid out. The plaintiffs insist upon the interest on the dividends laid out during the life of the bankrupt.

Mr. Attorney General and Mr. Spranger for the plaintiffs.

The only question is, whether the plaintiffs are entitled to the dividends during the life of the husband, or they are to accumulate for the wife and children. If this last, which is contended for by the answers, be complied with, it would create an inequality in the bankrupt laws. — The defendants must contend [*] that the assignees are in all respects acting in the place of the husband, which proposition we are not bound entirely to admit, as there are many cases where, though the husband having the money of the wife must make it good, it is not so where third persons are concerned. *Ex parte Mitford*, ante, vol. i. p. 398.

Lord Chancellor. — I think the only question is, whether the assignees could not have sold this annuity. There is no ground for applying this to the making good the fortune of the wife, unless the growing payments can now be considered as belonging to the husband. *Osman v. Smith*, MSS. (2) They are admitted to prove upon equitable grounds. The wife and children can have no claim until the death of the husband, though it is *debitum in presenti*, it is *solvendum in futuro*, therefore they come in the class of creditors under the 7 Geo. 2.

Mr. Solicitor General for the defendants. — In equity, this interest belongs to the wife and children. If it stood independent of the bankruptcy, and the husband had covenanted in this manner, and a bill had

(1) *Per Lord Eldon C.* "There is an obvious distinction between a disposition to a man until he become bankrupt and then over, and an attempt to give him property, preventing his creditors obtaining any interest in it, though it is his. There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, that if property is given to a man for his life, the donor cannot take away the incidents of a life estate in such property." *Vide in Brandon v. Robinson*, 18 Ves. 432, 433. See that case, and *Foley v. Burnell*, ante, 1 vol. 274. with the notes. *Et vide In re Murphy*, 1 Scho. & Lefroy, 44. *In re Gardiner*, 2 Scho. & Lefroy, 228, &c.

(2) *Ex parte Smith* in the matter of *Osman*, Cooke, B. L., 223, (6th edit.) See also the cases, *ibid.* 235, &c.

been

been brought in this Court to compel the husband to pay the money, and he had paid but 2000*l.* into court, professing his inability to pay the residue, he would not have been suffered to take the interest of the 2000*l.* till he had made good the other 2000*l.* The rule of equality only holds good with respect to creditors who stand in similar situations.

Lord *Chancellor*. — Suppose the man had turned out to be a bankrupt before the accumulation had made 2000*l.*, how could you have proved?

Mr. *Solicitor*. — I must have proved for the difference between the accumulation, and what remained of the 4000*l.*

Lord *Chancellor*. — The great difficulty is, that, if I cannot determine that the growing instalments of this annuity were a new estate, I am very apprehensive that I cannot relieve you; for it is only as being the estate of the husband that you can get at it.

[*] Mr. *Romilly* on the same side. — By the deed it is intended to be a condition precedent, before he is entitled to receive the interest. The money is payable the moment he became a bankrupt, for certainly the bankruptcy was a discontinuance of the trade.

An equity that resembles this, is when the assignees come into court for the wife's fortune, and the Court in that case always requires a settlement to be made upon her.

Lord *Chancellor*. — Is the husband now entitled by his beginning a new trade?

Decree for the plaintiffs to have the interest of the money during the life of the bankrupt.

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ATTORNEY GENERAL *against* GREEN and University College,
OXON.

(Reg. Lib. 1788. A. fol. 215.)

AN information, at the relation of *Francis Walsh*, upon the will of the late Dr. *Radcliffe*, dated 13th September 1714, by which he devised his manor of *Linton*, and all other his lands and hereditaments in *Yorkshire*, unto his executors and their heirs, upon trust to pay there-out yearly, six hundred pounds to two persons to be chosen, by certain great officers of state and others, out of the University of *Oxon*, where they are masters of arts, and entered on the physic line, for their maintenance, &c. as travelling fellows, with several provisions for the same, "and the yearly overplus of the rents and profits of his said *Yorkshire* estate, he willed to be paid for ever to University College, *Oxon*, for the buying of perpetual advowsons, for the members of the said college." He then gave several annuities which he charged on his *Buckinghamshire* estates; and then followed this clause, "and all my manors, lands, and hereditaments in the counties of *Bucks*, *Northamptonshire*, *Yorkshire*, *Surry*, and elsewhere, and all my real and personal estate whatsoever charged with and subject to the aforesaid several annual payments, bequests, and legacies, I do give and devise unto (the executors) and to their heirs, executors, and administrators; and I will that all the residue and overplus of my real and personal estate, remaining after [*] the payment and performance of the several legacies and bequests aforesaid, should be by them paid and applied to such charitable uses as they in their discretion shall think best, but no part thereof to their own use or benefit;

Devise of estates [before the mortmain act] to trustees for the use of University College, to buy advowsons; the college having as many as allowed by the mortmain act (2), the devise shall be performed by exchange of advowsons, or otherwise cy pres: the heir at law, being disinherited, where the gift is good at the time. (1)

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(1) See also *Attorney General v. Minshull*, 4 Ves. 11; and the approbation of the principal case by the M. R. *ibid.* p. 14; but more especially the whole doctrine at length, as confirmed and elucidated by the elaborate judgment of Lord *Eldon* C. in *Moggeridge v. Thackwell*, 7 Ves. 36. &c.

(2) The restriction here alluded to was repealed in 1805, by the 45 Geo. 3. c. 101.

but

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but I will that all their charges and expences, and the salaries and wages of bailiffs and servants by them employed in the receipt of the rents, and for the managing of my said estate, shall be paid and reimbursed to them. — And I will and desire, if it may be done by law, my *Yorkshire* estate should be conveyed and settled by my executors, on the master and fellows of University College for ever, in trust for the performance of the uses and trust herein before declared of and concerning the same estate."

An information had been filed and a decree made in the year 1716, that the trustees should convey the *Linton* estate to the college, which had been done. — The estate for a great length of time did not produce more than would pay the travelling physicians, but, at length, producing a surplus, the college, in obedience to the directions of the will, purchased advowsons till they possessed as many as the statute of mortmain 9 Geo. 2. would allow, i. e. a number equivalent to that of a moiety of the fellows. (3) A surplus still continuing to arise, the college (under the idea that they could not purchase further advowsons) laid out a part of the surplus in encreasing the value of the already purchased livings, and in adding to the income of the headship of the college.

The present information was filed against *Green*, the now heir-at-law of Dr. *Radcliffe*, and the College, praying a proper application of the surplus profits of the estate not laid out in the purchase of advowsons under the directions of the will.

The heir-at-law claimed the surplus as undevise, and therefore a resulting trust for him. The college submitted, whether the devise being before the mortmain act, they might not purchase advowsons, though to a greater number than that of a moiety of their fellows, and, if not, insisted the surplus should be applied to other uses for the benefit of the college, as being the nearest possible application to the intent of the testator.

The cause came on in *Hilary* term 1788.

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[*] Mr. Attorney General, (*Arden*), Mr. Solicitor General, (*Macdonald*), and Mr. *Mitford* for the relator. — The question is, whether the operation of the stat. of mortmain, 9 Geo. 2., can defeat this devise to the college, by raising a claim either on the part of the heir-at-law or of the crown. The principal claim is that of the heir-at-law, as the crown would most probably be favourable in appointing the charity trust to the wish of the testator. As to this, the Court, upon finding a charity inapplicable to the intended uses, has never from thence raised a use for the heir-at-law. He was, in all events, intended to be disinherited. The Court, has, therefore, applied the fund which was intended for charitable purposes, to other charities as nearly as possible to those intended by the testator, as, by increasing the number of objects, where the property has exceeded the allotment to the number proposed. This has been the case with respect to alms-houses, where, upon the increase of the fund, the number of persons to be benefited has been enlarged. The first case is that of *Thetford* School, 8 Co. Rep. 130., where the revenues of a manor being given to the maintenance of a preacher, master, and usher, &c. of a free grammar school, and a distribution made by the testator himself, it was held that the increased revenue should be applied to the increase of their stipends, and, if any surplus remained, it should be expended in the maintenance of a greater number of poor. — This case is followed by several others to the same purpose, in *Duke's Charitable Uses*, 78, &c. Where the charity cannot take place in the same form, it shall as nearly as possible, and not go to the heirs. *Attorney General v. Guise*, 2 Vern. 266. *Aylet v. Dodd*, 2 Atk. 238., where, there being no school-master was held not to exonerate the lands charged for the

(3) See the preceding note.

support of one. So where a charity was to maintain *Popish* priests; after the Reformation, it was applied to other purposes, and was not to the use of the heir, and a salary for the maintenance of independent lecturers was applied to the maintenance of catechistical lecturers in the same towns (2 Vern. 266, 267.) In the case of the *Attorney General v. Baliol College*, December 11th, 1744, (which was a new information, on the same charity with *Attorney General v. Guise*, 2 Vern. 266., where the point was in fact determined, it having been decreed the heir could take nothing) Lord *Hardwicke* had some doubt how far the will could be executed, on account of the restoration of presbytery, but considered himself as relieved from that point by the decree of 1699. The directions[*] and decree were quarrelled with because part of the money was directed to be laid out in the increase of the library of *Baliol College*. In the *Attorney General v. Johnson* (2), 12th November 1753, Sir *David Williams*, having given the great tithes of a parish, amounting at the time 20l. a year, to certain charitable uses, appropriating the proportions to each, the tithes increasing in value, and the heir claiming the increase, the court determined against his claim, in favour of the extension of the charity. In the *Attorney General v. Hoare*, which came on 10th July 1779, before Lord Chancellor, and afterward on further directions before the Lords Commissioners, 29th October, 1783., the testator devised his real and personal estate (with certain exceptions) for these uses, to pay every one of six scholars 10l. a-year; he then devised and bequeathed the same (not saying to whom) to purchase advowsons, to be presented to by *Jesus College*. He then appointed the Bishop of *Hereford*, the Master of the college, and others, trustees. In 1717, there was a decree that the heir-at-law of the testator should execute a conveyance to trustees, to the uses of the will. And on a rehearing, a balance, in the hands of the receivers, was ordered to be applied to the use of the college. In the new information, it was stated that the college had purchased as many advowsons as, by law, they could, and, that the heir at law had never made the conveyance decreed, the information was therefore filed against the then heirs-at-law, and prayed that the profits might be laid out for the benefit of the college, as the Court should think proper: Upon the hearing on the 10th of July, 1779, the proper accounts were directed, and the cause coming on for further directions 29th of October, 1783, it was argued for the heirs-at-law, that they had a title to the surplus rents and profits, and this was rested particularly upon what Lord *Coke* says, as to the heir of the founder taking on the failure of a monastery. The decree was that the adult heirs should convey to such persons as Dr. *Hoare* should appoint, the minor heirs to join, having day given them to show cause, and that the college should lay a plan before the Master: So that the decree was complete against the heir-at-law.

Mr. *Mansfield* and Mr. *Scott* for the college, — also contended that the heir-at-law was absolutely disinherited, they added the cases of *Attorney General v. Arnold*, Shower's Parl. Cases, [*] 22. *Baylis v. Church*, 2 Atk. 239. *Wheeler v. Shear*, Moseley, 288. and *White v. White*, (ante, vol. i. p. 12.) as decisions on this point.

2d point. — The college supposed, from the case of *Attorney General v. Hoare*, that they were restrained by the mortmain act from purchasing a greater number of livings than were equal to a moiety of the fellows. But that point was not finally determined in the case, and, upon the fairest construction of the statute, does not appear to be the meaning of the clause. The statute was only to operate upon gifts after the 24th June 1736, and all gifts previous to that time have been held good. The clause as to the number of advowsons is restrictive of the exception of

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colleges as being able to hold advowsons; it cannot, therefore, be held to be a prohibition of colleges having more advowsons than amount, in number, to a moiety of their fellows, but only to restrain their taking more by future gifts. If *other* had meant *more*, colleges having already more advowsons than the moiety of their fellows, must have lost so many of their advowsons as exceeded that number, which certainly was not the case. The statute, therefore, did not mean to diversify their right to hold advowsons obtained by any former act, or which they possessed at the time. This will, being made before the statute, it is not affected by it. In this case it is purely by accident that the event has happened after the statute, by the increased rents of the property; but the case must be the same as if it had been a gross sum, given previous to the statute, to be laid out in advowsons. Suppose it had been so, and the money had not been laid out, from proper purchases not offering; the money might be laid out notwithstanding the statute. The disposition might still have been legally made of the money; money to be laid out in this Court is considered as done, as in the case of money to be laid out in land it is considered as land. The college, however, thinking themselves restrained from purchasing more advowsons, have laid out the money in the increase of the livings already purchased, as being a purpose the most analagous possible to that which the testator intended, and by adding to the value of the headship, and hope the application will be approved, and a scheme of application for the use of the college directed. (4)

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[*] Mr. Selwyn for the heir-at-law. — The heir-at-law is always considered as a favourite of the court, and not to be disinherited but by the clear intention of the testator. If the point was decided against the heir in the case of the *Attorney General v. Hoare*, it is certainly the first time of its being so decided.

Be that as it may, no decree can be made on the present information. If the information had been by the Attorney General alone, against the college and heirs, it might be good, but this information is at the relation of *Francis Walsh* who does not appear to be interested. An information, at the relation of a private relator, is never admitted without stating his interest. In the *Attorney General v. Bucknall*, 2 Atk. 328., it is only laid down that he need not be the nearest person interested, but there is no case of an information at the relation of a mere stranger; and, in this case, he does not show any interest.

Lord Chancellor. — Is there any case of an information being dismissed for want of interest in the relator? It struck me as extraordinary that it should not be stated that he had an interest. That question must have been agitated in the *Attorney General v. Bucknall*.

Mr. Selwyn. — There is another defect; the information does not state the whole of the will, the residuary clause is very large, and the trustees are not before the Court. It is true they have conveyed to the college under the decree, but they were decreed only to convey to the uses of the will.

Mr. Mitford. — The residuary clause was left out, as appearing to apply only to the *Buckinghamshire* estate, not to the *Linton* estate, which was ordered by the will to be conveyed to the college, and had been so conveyed by the trustees. It appears that what was given to the trustees was only what would arise from rents and profits to be collected by bailiffs, &c. which could not apply to an estate which was given for ever.

Lord Chancellor. — Suppose any thing results, it will exclude the heir; the trustees could only convey to the college such an estate as they had, and, if any thing results from the *Yorkshire* estates, the

(4) The restriction, as to the two Universities, was repealed in 1805, by 45 Geo. 3. c. 101. sweeping

sweeping clause takes it in. The trustees must be before the Court, and the heir, though absolutely [*] disinherited, is interested to raise the objection that the Court cannot dispose of the clause, because it would leave another bill behind.

The cause stood over to make the trustees parties.

This having been done, the cause came on again 27th of January 1789, when Mr. Attorney and Solicitor General for the relator.—Mr. Mansfield and Mr. Hardinge for the college—and Mr. Selwyn, for the heir at law, argued much to the same purpose as the former argument: the last mentioned gentlemen added to the cases already cited, that of the *Attorney General v. Whorwood*, 1 Ves. 534. as deciding that where the regulations imposed were inconsistent with the rules of the charity, it would be a resulting trust for the heir at law.

Mr. Pigot and Mr. Campbell, for the trustees, contended, that whatever was not given to the charity went to the residuary legatees, there being an express intention in the testator, to dispose of every thing. They cited (2) 8 Mod. 222. and a MSS. case of *Goodright v. Optie*, for this purpose.

Lord Chancellor said the point in question was with respect to the charity itself. The Court has had a plan of arrangement laid before it; supposing the whole object of the charity to fail, and yet that the estate is by the will appropriated to charitable uses, still the will is a clear exclusion of the heir-at-law. It is under this idea, that many charities have been disposed of under the privy seal. Is then the heir disinherited? He is to claim a trust, not resulting from the will, but from the act of the legislature. If there be any case where the heir-at-law is disinherited, it must be that where the devise was good at first.—In the first decree, the devise was held up till the license to hold in mortmain should be obtained. So it was by Lord Camden, in the case of *Downing College*, which licence has never yet been obtained. Considering the words of the last clause of the act, it is difficult to make it out that there is such a limitation as is contended for, but it has been so constantly understood the other way, that I do not think myself warranted to hold a different opinion. I do not see why some arrangement should not be made, by way of exchange of advowsons. But it is not necessary to declare that now. If that [*] should fail, the question between the general trustees and the heir-at-law will then arise. I confess it will be difficult to obtain it for the heir-at-law, and perhaps as difficult for the general trustees. If all those should fail, it may be a question whether it is become fiscal, or will go to the heir-at-law, as resulting to the founder. (3)

(2) 8 Mod. Rep. 723.

(3) His Lordship ordered that the defendant should be at liberty to lay a plan before the Master for the application of the surplus rents and profits of the charity estates in question, from the time of filing the information, either according to the will of the testator, or as near thereto as the law would admit. R. L.

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ARTHUR ANNESLEY POWEL, (late ARTHUR ANNESLEY ROBERTS), an Infant, first Tenant for Life under the Will of JOHN POWEL, Esq. the Testator, by PHILIP DEARE, Esq. his next Friend, and also the said PHILIP DEARE, one of the Trustees and Executors in the said Will named. - - - - - Plaintiffs.

RICHARD CLEAVER, Esq. another Trustee and Executor in the said Will named, KEENE STABLES, Esq. the other Trustee and Executor in the said Will, and Remainder-man in fee of the Estates therein devised, WILLIAM ROBERTS, Esq. and ELIZABETH, his Wife, Father and Mother of the Plaintiff, the Infant, and of the Infant Defendants, and also Annuitants in the said Will named, and which said ELIZABETH is the Testator's Sister and Heir at Law.

JOHN ROBERTS, WILLIAM ROBERTS, Junior, and HARRIOT ROBERTS, Infants, younger Children of the said WILLIAM and ELIZABETH ROBERTS, Legatees and Remainder-men in the Testator's Will named.

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THOMAS PHILIP DURELL, Esq. and ANN, his Wife, which ANN is another of the younger Children of [*] the Defendants, ROBERTS and his Wife, and also a Legatee and Person in Remainder, under the said Will.

The Reverend THOMAS COMYN and HARRIOT CHARLOTTE, his Wife, which HARRIOT CHARLOTTE is a Legatee, and also entitled in Remainder under the said Will. - - - Defendants.

(Reg. Lib. 1788. B. fol. 277. to 284. b.)

There is no decided case that guardians can be appointed for a child (by a stranger) during the life of the parent, but the law will take care that the child shall be educated according to his expectations. (1)

A legacy, by a stranger, to a female infant, not adeemed by his paying a marriage portion, and making other provisions for her and her husband. [See Note (2) in the following page.] A deposit of bank notes with the executors, for the depositor's sister and her children, is a gift of the money among them.

(1) It is quite settled, that the Court will not only control a father in the management and the possession of his child, under circumstances, but altogether remove the child from his influence if he is a depraved person, &c. *Vide ex parte Warner, postea*, 4 vol. 101.; *Cruise v. Hunter*; *De Manneville v. De Manneville*, 10 Ves. 52, &c. 61, 62, &c.; 2 Fonbl. T. E. 224. note (a) And see Lord Eldon C.'s observations on the principal case, 10 Ves. 63. The case of *Cruise v. Hunter* having been frequently cited, as in *ex parte Warner & De Manneville's case*, *ubi supra*, the Editor subjoins an accurate note of it, with which he was favoured by Lord Colchester.

CRUISE AND ANOTHER *against* ORBY HUNTER.

In Chancery Sittings after Trinity Term, 1790.

The Court of Chancery will take an infant out of his father's care if there is danger of his abusing his parental authority.

This was a *Petition* stating the entangled state of Mr. Hunter's property, that he was an outlaw and resided abroad, and that his son, an infant, was entitled, in remainder, to a very considerable estate; as also to a maintenance by the will of his grand-father — Prayed that Mr. Hunter might be restrained from taking him abroad, or improperly interfering with his education, which was then principally directed by his mother who lived separate from her husband.

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the defendants, *Cleaver and Stables*, and the plaintiff *Philip Deare*, and their executors, administrators, and assigns, for a term of ninety-nine years, and from and after the determination of the term, he gave the same to the use of his eldest nephew *Arthur Annesly Roberts* (the infant plaintiff) for life, remainder to other trustees to preserve contingent remainders, with remainder to his first and other sons in tail male; remainder to his second nephew *John Roberts*, for life, with remainder to trustees, &c.; remainder to his first, and other sons, in tail male; remainder to his third nephew, *William Roberts*, junior, for life, remainder to trustees, &c. *ut supra*; remainder to his niece *Ann Roberts* (now *Mrs. Durell*) for life, with remainders *ut supra*; with remainder to the several daughters of the several takers for life, in the same order as they took their several estates, as tenants in common in tail general; remainder to Miss *Harriot Charlotte Stables* (now the defendant *Mrs. Comyn*) for life, with like remainders to trustees, &c.; remainder to her brother (the defendant) *Keene Stables* in fee, with power of jointuring to the male takers for life, and to all of them of making usual leases. The trusts of the term were (*int. al.*) to raise 400*l.* a-year, for the testator's sister, (the defendant *Elizabeth Roberts*,) for her life, and 100*l.* a-year for the defendant *William Roberts* (her husband) for his life, and to raise, out of the rents and profits, provisions for the maintenance and education of the plaintiff, his eldest nephew, at the rate of 100*l.* a-year, until he should attain the age of fifteen years, and afterwards 200*l.* or such further sum as the trustees should think necessary till twenty [*] one, but upon the express condition "that they the said (the trustees) the survivors and survivor of them, and the executors, administrators, or assigns of such survivor, shall have, and I do hereby direct and desire that they may have the care, guardianship, tuition, and management of the person of my eldest nephew, during his minority." And subject to these trusts the term was to attend the inheritance. The testator then bequeathed his personal estate to the executors, in trust, to pay out of the interest 200*l.* a-year for the maintenance of his two younger nephews and niece, till they should attain their respective ages of twenty-one years, and then to pay 18,000*l.* equally to be divided between them,

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Affidavits were filed on both sides imputing very gross charges to both father and mother.

Upon the petition first coming on the Chancellor threw out that he would not allow the colour of parental authority to work the ruin of his child; and afterwards ordered that his father should be restrained from interfering with the management of his child without the consent of Lord *Hawke* and Mr. *Adams*, whom both parties allowed to be proper persons for such purpose.

The Order made was as follows:—"Lord *Hawke* and Mr. *Adams* undertaking to take on themselves the care and education of the infant; Ordered, that the infant be placed under the care of the said Lord *Hawke* and Mr. *Adams*, and that the defendant *C. O. H.*, his father, be restrained from removing the said infant from the school and situation in which he is now placed, and from carrying him abroad out of the jurisdiction of this court, and from using and employing any means for that purpose."

Note.—The jurisdiction of the Court being questioned by the counsel for Mr. *Hunter*; the Chancellor observed, that he knew there was such a notion, but he was of opinion, that this Court had arms long enough to reach such a case and to prevent a parent from prejudicing the health or future prospects of the child: And that whenever a case was brought before him, he would act upon this opinion. If the House of Lords thought differently they might controul his judgment; but he certainly would not allow the child to be sacrificed to the views of his father.

(2) *Vide per* Lord *Eldon* C. on the principal case in *ex parte Dubost*, 18 Ves. 153. It was held clearly in that case, that the father of an illegitimate child is considered as a stranger in such instances, and that the subsequent advancement, &c. will not be considered as an ademption or satisfaction unless it is actually proved to have been so clearly intended. 18 Ves. 140. 147, &c. 151, 152, 153, &c. S. P. also *Wetherby v. Dixon*, Coop. Ca. Ch. 279. See also S. P. in *Grave v. Lord Salisbury*, ante, 1 vol. 425, 426, 427, and the observations of Lord *Eldon* C. thereupon, 18 Ves. 152.

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upon the same *express* condition as is before recited as to the eldest nephew, with a provision for survivorship among the said two younger nephews and niece. He then gave to his said niece, the further sum of 4000*l.* upon the day of her marriage, and gave and bequeathed to the said *Harriot Charlotte Stables*, the sum of 6000*l.* payable in three months after his decease, and, subject to these and some other legacies, he directed his trustees to lay out the residue of his personal estate in the purchase of lands, to be settled to the same uses to which he had devised the real estates by the will, and appointed *Cleaver, Stables, and Deare*, executors. On the 8th *March*, 1783, the testator made a codicil to his will, and thereby gave to his niece (the defendant *Harriot Roberts*, who was not born at the time of the will) 5000*l.*

After the making of the will, *viz.* in *June*, 1776, *Harriot Charlotte Stables* (now the defendant *Mrs. Comyn*), intermarried with the reverend *Thomas Comyn*, which marriage was previously approved of by the testator, who agreed to give 5250*l.* as a marriage portion with her, and upon the 8th of *June*, 1776, he paid to *Mr. Comyn* 250*l.* and made an entry in his ledger. "*June* 8th, 1776, Miss *Harriot Charlotte Stables*, to paid *Mr. T. Comyn*, in part of portion carried to folio 106. 250*l.*; and, by indenture, 25th *June*, 1786, previous to, and in consideration of the marriage, declared that he would stand possessed of an annuity of 100*l.* (part of an annuity of 200*l.* to which he was entitled during the lives of the said *Harriot Charlotte Stables* and *Ann Roberts*) for the said separate use of the said *Harriot Charlotte*, during the marriage, and afterwards, during the rest of her life if she should survive her husband, and also transferred into the names of trustees in the said marriage settlement, the sum of 5000*l.* 3 per [*] cent. bank annuities upon the trusts therein mentioned, for the benefit of *Harriot Charlotte* and her husband, and their issue, and in default of issue, as she should appoint, and in default of appointment, for her heirs, executors, and administrators. And the testator made entries of these transactions in his ledger, in his own hand-writing. "To *Harriot Comyn*, in part of fortune, an annuity of 100*l.* per annum, value 1000*l.* — To ditto, in full of ditto, 5000*l.* annuities consols. 3*l.* per cent. valued to her at 80*l.*, to her father at 8*l.* 4000*l.*" In 1782, the testator laid out 800*l.* in the purchase of a chaplainship of *Chelsea Hospital*, and made entries thereof in his cash-book and ledger. "1782, *April* 25. By fees on *Mr. Comyn's* commission as chaplain, 2*l.* 16*s.* — By *Mr. Jago*, paid *Mr. Palmer* for chaplainship of *Chelsea Hospital* 800*l.*" — These sums of 250*l.* 1000*l.* — 4000*l.* and 800*l.* (making 6050*l.*) the plaintiffs charged, were the whole provision the testator meant to make for the defendant *Mrs. Comyn*, and were instead and lieu of the legacy of 6000*l.*

About the month of *March*, before the testator's decease, the testator delivered into the hands of the defendant, *Cleaver*, a sealed packet, directed to him (*Cleaver*) in the testator's hand writing, expressing himself at the time of delivering, thus, "pray take care of this for *Nancy*, or Miss *Roberts*;" and soon after delivered to him another sealed packet, with a like direction, saying, "pray take care of this for *Mrs. Roberts* and her children, and let them have the money when and how you please." The packets were not opened during the testator's life-time, but, after the death of the testator, they were opened, at a meeting of the executors, when one of them was found to contain a paper on which was written by the testator, "one thousand pounds for Miss *Roberts*," and it contained bank notes to the amount of 1000*l.* In the other parcel was a written paper with the following words "For the benefit of *Mrs. Roberts* and her children," the paper contained bank-notes to the amount of 1500*l.*

After the decease of the testator, *Mr. Roberts*, the father of the infant plaintiff

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plaintiff and defendants, made no objection to the guardianship of the children resting with the executors of Mr. *Powel's* will. — They had placed the infant under the care of Mr. *Herbert Croft*, at *Oxford*, but the father afterwards withdrew [*] him from thence, and placed him under the care of Mr. *Parke*, as his private tutor, and entered him at *Wadham College, Oxford*, under the general tuition of Mr. *Mason*. In the mean time, Mr. *Roberts*, the father, received the annuity of 100*l.* *per annum*, and applied to the trustees, for expences relative to the infant plaintiff.

The cause came on to be heard on the 10th of *December*, 1785, and took up that day and the 12th of the same month, when three questions arose.

1st, With respect to the guardianship of the infant plaintiff, whether, under the circumstances, it was in the father, or in the executors and trustees of *Powel's* will?

2dly, As to the legacy of 6000*l.* to Miss *Harriot Charlotte Stables*, whether the provision upon her marriage with the Reverend Mr. *Comyn*, by the payments above stated, were or were not a satisfaction of the legacy?

3dly, As to the deposits, whether they continued the property of Mr. *Powel* till his death, or were absolute gifts; and, if the latter, whether, under the terms for the benefit of Mrs. *Roberts* and her children, she should take for life, with a remainder to any, and whom, of her children (*i. e.* whether the infant plaintiff and *Ann Roberts*, who had the other 1000*l.* delivered for her particular use, should take shares) or she and her children were to take as tenants in common, and, in that case also, whether the plaintiff, and her daughter *Ann* were to take?

Mr. *Scott* for the plaintiffs, stated the case at large, and the questions arising upon it.

With respect to the guardianship, he only contended that the father could not claim the annuity given to him by the will, without renouncing the guardianship of the children.

2. As to the question of satisfaction, he said this was the question of more doubt than any other in the cause: the manner of the satisfaction was by advancement during the testator's life-time, and although, if there were no other evidence in the cause, it might be difficult to contend that what had been done was a satisfaction, yet, here, it was fully explained by the evidence in the [*] cause. — Where a person gives a legacy, and afterwards advances the legatee during his life-time, it is a satisfaction; and the Court will admit of parol evidence, to show that it was intended to operate as such *pro tanto*, or in full. — It was decided in *Rosewell v. Bennet*, 3 Atkyns, 77, that such evidence was admissible. In *Pile v. Pile*, 1 Eq. Ca. Abr. 204. cited in *Haynes v. Mico* (*ante*, v. i. p. 131.) similar evidence was admitted. In this case, *Powel* has left no doubt as to his intention, he has entered an accurate account of the sums advanced in his books. The sums advanced are a part satisfaction, and the purchase of the chaplainship completes the whole sum. On the other side, it will be contended, that this cannot be a satisfaction, because Mr. *Stables* was to pay 2000*l.* of the money: but that is matter merely between him and *Powel*. — One of the witnesses to the execution of the will is abroad. (3)

Lord Chancellor — I doubt whether the rule has ever been laid down so largely that the will could not be proved without examining all the witnesses, although the practice has been to examine all. (5)

(3) The hand-writing is held sufficient proof, if one of the witnesses is abroad, or insane, &c. Lord Carrington v. Payne, 5 Ves. 404.; Bennett v. Taylor, 9 Ves. 381.

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Mr. *Hargrave* on the same side—said he would argue only two points.
1st. The question whether upon Mr. *Powel's* will, and the subsequent circumstances, the guardianship of his three nephews remains with their father, Mr. *Roberts*, or has passed from him to the trustees named by Mr. *Powel*. It is of importance, that the Court should not leave this point undecided; because if the matter shall be left in its present state, the trustees will be at a loss how to act. The eldest nephew has been taken out of their hands by his father, and they are anxious to be informed whether their responsibility continues or is determined.

If a father can renounce his right of guardianship, in any case, that right ought to be considered as renounced in the present one. It is scarce possible to imagine a case with stronger circumstances against a father; unless one supposes a forfeiture of the guardianship by abuse of the authority, which I allow is no ingredient here. Every thing but abuse of parental authority concurs for considering the guardianship as transferred to Mr. *Powel's* executors and trustees.

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[*] Mr. *Roberts* and his family derive every thing from the bounty and affection of Mr. *Powel*. Amongst them they share the immense fortune of about 300,000*l.* all coming from Mr. *Powel*; without Mr. *Powel* they were all confessedly unprovided for.

Mr. *Roberts*, the father, during Mr. *Powel's* life, permitted the children to be brought up by, and at the expence of Mr. *Powel*.

Since Mr. *Powel's* death, Mr. *Roberts* has himself taken benefit under the will of Mr. *Powel*.

The will expressly directs, that the guardianship of the three sons of Mr. *Roberts* shall be in the hands of Mr. *Powel's* executors.

The maintenance to the eldest son is given, expressly, on the condition, that Mr. *Roberts* permits the guardianship to be with the executors.

Not only the maintenance given for the two other sons, but the legacies of 6000*l.* a-piece are expressly upon the same condition.

Mr. *Roberts*, knowing all this, acquiesced for a considerable time in this arrangement of the guardianship; not only yielding the management of his sons to the executors, but calling for, and receiving, the maintenance provided for them. (4)

Nor has Mr. *Roberts* the least pretence of complaint against the executors in respect to the care of his sons, he has the same comfort from their society as if he continued their guardian: no abuse of the trust is pretended.

Indeed Mr. *Roberts* appears to have preferred a different person from the gentleman appointed by the executors for superintending the education of his eldest son: but the executors are willing to acquiesce in Mr. *Roberts's* objection to continuing the gentleman they originally chose: they are willing also to listen to his recommendations in other respects, as far as their duty will permit. (5) Yet notwithstanding all these circumstances Mr. *Roberts* now chooses to resume his right of guardianship over his eldest son.

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[*] But upon what principle can he be thus allowed to controvert the will of the benefactor to him and his family?

He says, that he did not know his right. But this is a strange plea, scarce credible.

Besides, will the Court permit him to resign the guardianship of two of his children, and at the same time retain that of the other?

It is material also to consider whether a parent can insist upon his full

(4) This argument, "that Mr. *Roberts* had made his election, would not sustain the jurisdiction; but Lord *Thurlow* would not suffer the feelings of the parents to have effect against that duty which the interest of the child required." Per Lord *Eldon* C. 10 Ves. 63, 64.

(5) See the first note to this case, and the references; especially 10 Ves. 63, 64.] right

right of guardianship, where by so insisting on that right against the condition of a legacy to them, such legacy may be forfeited.

Such being the case, I do not see how the Court can gratify Mr. *Roberts* by suffering him to resist Mr. *Powel*'s disposition of the guardianship, unless it shall be the Court's opinion, that the authority of a parent as guardian to his children cannot be transferred except by abuse of the authority.

2dly. With respect to the question, whether the fortune advanced by Mr. *Powel* to Mrs. *Comyn* on her marriage, and the provision he afterwards made for her husband, are to be considered as a satisfaction of the legacy of 6000*l.*, to Mrs. *Comyn* by Mr. *Powel*'s will, or at least a satisfaction *pro tanto*.

It is a very serious question; and not to debate it, would, in my opinion, be a great omission in those who act for the infant plaintiff.

The question may be argued in two ways;

1. The fortune and provision made for Mrs. *Comyn*, after the will may be argued as a satisfaction, by assimilating it to the case of a parent and child.

2. There are special circumstances attending the case, from which alone it may be inferred, that Mr. *Powel* meant the provision for Mrs. *Comyn*, subsequent to the will, as a satisfaction of the legacy.

[*] 1st. If this was the case of a parent and child, I apprehend, that there could not be a doubt but that the legacy would be considered as satisfied by the fortune afterwards given to Mrs. *Comyn*, without taking the special evidence of intent into the account.

It is a point settled by the authorities, that a fortune advanced by a parent to his child, on marriage, is presumed to be a satisfaction of a prior legacy, if there is any resemblance between the two provisions. (6) *Hale v. Acton*, 2 Chan. Rep. 35. and *Elkenheads'* case, cited in 2 Vern. 257. are cases of this sort. — The rule is well laid down in *Irod v. Hurst*, Freeman's Ch. Rep. 224. — other cases are *Hoskins v. Hoskins*, Preced. in Chan. 263. and *Hartop v. Whitmore*, 1 Peere Wms. 681. In the former an advancement of 650*l.* was held to be a satisfaction of 750*l.* *pro tanto*. In the latter Lord *Macclesfield* held 300*l.* given to a daughter, on marriage, a total ademption of a legacy of 500*l.* (7)

Here is a great resemblance between the provision by the will and the provision afterwards: 6000*l.* by the will: as Mr. *Powel* himself calculated the value of his advancement on Mrs. *Comyn*'s marriage, it was 5000*l.* exclusive of the 2000*l.* he expected to be repaid by her father; add to this the subsequent present of the chaplainship to Mr. *Comyn*, and it completes the 6000*l.*: with the two thousand pounds expected to be repaid by Mrs. *Comyn*'s father, it is rather more than the legacy. The provision for the husband of Mrs. *Comyn* ought to be accounted, though it will be said this is a provision for the husband and not *ejusdem generis*. *Chapman v. Salt*, 2 Vern. 646., is an authority that a provision for the husband will suffice. *Norton against Norton*, in a note 3 Peere Wms. 317. and *Rosewell against Bennett*, 3 Atk. 77. show that a provision by office may be a satisfaction of a legacy in money.

Other circumstances strengthen the presumption of satisfaction here. If Mrs. *Comyn* takes both the legacy and provision on her marriage, she will have more than the testator's two younger nephews. — They have only 6000*l.* a-piece; at the time of the will, it is clear, that she was only to have the same portion as the two nephews, what ground is

(6) See the Editor's note to *Warren v. Warren*, ante, 1 vol. 305.; per Lord *Thurlow* in *Grave v. Lord Salisbury*, *ibid.* 427.; et per Lord *Eldon*, 18 Ves. 152., &c., &c.

(7) Lord *Redesdale* adds the following note: "But Lord *Hardwicke* determined that a portion was not an ademption of a legacy of a share of the residue of the father's estate." *Farnham v. Phillips*, 24th Oct. 1741.

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there for supposing an alteration in Mr. *Powel's* mind afterwards? When Mrs. *Comyn* married, it was a good reason for advancing her portion [*] immediately, but I do not see how it shows an intent to increase the portion.

By the will of Mr. *Powel*, 10,000*l.* is given to his eldest niece, now Mrs. *Durell*. At that time, it is clear that Mr. *Powel* intended 4000*l.* more for Mrs. *Durell* than for Mrs. *Comyn*. Will his afterwards paying a portion to Mrs. *Comyn* on her marriage prove that the *quantum* of her portion was to be increased beyond that of Mrs. *Durell*, who is more considered by the will?

These are circumstances, exclusive of the evidence of special intent under Mr. *Powel's* own hand, on which I shall hereafter rely.

But, on the other side, it will be said, that this case is to be distinguished from that of parent and child; and that the presumption of satisfaction of a legacy from a subsequent provision only holds between persons so nearly related. Even the doctrine as to parent and child will perhaps be complained of.

The presumption of satisfaction in case of parent and child is settled by authorities. To me it seems reasonable in itself, but, being settled, it certainly ought not to be disturbed.

Where a person, not a relation, puts himself *in loco parentis*, is not there greater reason for presumption of satisfaction? ought we not to suppose greater affection between the real parent and child, than in the case of an adoption?

If the affection is deemed greater, the presumption is for greater bounty.

There is no case, I believe, in which it has been judicially decided that the rule of presumption shall not hold in the case of one acting *in loco parentis*. — *Spinks v. Robins and Cope*, 2 Atk. 491. will perhaps be cited on the other side. But it was determined by Lord *Hardwicke* on circumstances: the provision subsequent to the will was *contingent*. *Shudall v. Jekyll*, 2 Atk. 510. may also be cited. But so much did it depend on circumstances, that Lord *Hardwicke* said, that, if Sir *Joseph* had been a parent, instead of a great uncle, he [*] should have held it not a satisfaction. *Grave* and Lord *Salisbury* lately determined (*ante*, vol. i. p. 425) was determined chiefly on the ground that the provision after the will was not *ejusdem generis*; the present Chancellor holding that a beneficial lease to the putative son was too dissimilar to the prior legacy to be presumed a satisfaction.

Mr. *Powel* clearly acted as a parent to Mrs. *Comyn*, both by his will, and by the provision on her marriage.

Suppose that, upon Mr. *Powel's* will, there was before the Court the case of a real child, as well as the case of an *adopted* child, such as Mrs. *Comyn's* case should be deemed, could the Court distinguish between the two, and refuse the double portion to the *real* child and grant it to the *adopted* one? This supposition puts the distinction between the case of parent and child, and that of persons not related, or distantly so, to a test: on such a case, would not the harshness of the distinction destroy it?

The case of *Chapman v. Salt*, 2 Vern. 646. is a case of satisfaction from a subsequent provision, where the legacy was to one not related to the testatrix.

2dly. Should the Court hold that the rule for presuming satisfaction of a legacy from a subsequent provision will not hold, except in the case between parent and child; still the special circumstances of intent remain to be considered.

Here I rely on the entries in Mr. *Powel's* hand-writing, subsequent to
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Mrs. Comyn's marriage. — In one entry he calls his advancement *part* of Mrs. Comyn's *portion*.

The word *portion* is of great force. By it, Mr. *Powel* almost makes himself a parent. (8) The word *part* is also of force.

In a subsequent entry, where he enumerates another part of the provision, he states it to be *in full of her fortune*. This last entry, I submit, is decisive of the case.

It is the evidence of Mr. *Powel* himself, and under his own hand, that the provision he made for Mrs. *Comyn*, on her marriage, [*] was a satisfaction of the legacy in his will. What he gave by the will must have been intended as the fortune of Mrs. *Comyn*; and the fortune given by Mr. *Powel*, on the marriage of Mrs. *Comyn*, is thus, by the entries in his own books, declared to be *in full* of what she was to have in the way of fortune.

Mr. *Mitford*, on the same side. — As to the question of satisfaction, it is difficult to bring it within the range of the cases. The intention has been collected from the situation, or the declarations of the parties. Where it has been from situation, it has been in cases where the party, having given legacies, has been afterwards called upon to make a provision on marriage or otherwise. If Mrs. *Comyn* can be brought within that range, the provision must be a satisfaction. A declaration on the part of *Powel*, that he intended an ademption of the provisions in the will, would be sufficient, and the entries amount to such a declaration; the sums paid, therefore, amount to a part satisfaction.

Lord *Chancellor*. — Lord *Bathurst* decided a case where there was a Roman catholic father, to whose son there was an estate given by a Protestant. (9) It is no where laid down that the guardianship of a child can be wantonly disposed of by a third person. The wisdom would be not to raise points on such a question, as the Court will take care that the child shall be properly educated for his expectations. It must be laid before the Court how the son is now disposed of.

Mr. Attorney General (*Arden*) and Mr. *Price*, for Mrs. *Roberts*, on the question relative to the deposit in favour of her and her children.

The words used at the time of the deposit amount to an immediate disposition in favour of her and her children. — That is, as she apprehends, exclusive of *Ann Roberts*, as the delivery was immediately accompanied by a separate gift for her; and *Cleaver* states in his answer, he understood it was for her and her other children. The application of the gift is controllable by the Court, which will admit of Mr. *Cleaver's* laying a scheme of application before the Master, that it be declared to belong [*] to Mrs. *Roberts* for life, with remainder to her other children exclusive of *Ann Roberts*.

Mr. Solicitor General (*Macdonald*) for the defendants. — With respect to the point of satisfaction, when the facts are clearly comprehended, this does not fall within any of the cases. It has been argued, 1st. as a naked case; 2d. as coupled with all its circumstances. (He stated the will, the monies advanced, and the chaplainship purchased.) Upon these premises, the question, independent of peculiar circumstances, is whether a legacy of 6000*l.*, given by a relation to a person for whom he is not obliged to provide, will be satisfied by an annuity settled in the marriage settlement, and a sum of 4000*l.* settled on the marriage in strict settlement. The case falls within no one of the prin-

(8) Lord *Thurlow*, however, held this denomination not to have the same effect in the present case, which was that of a stranger, as it would in the case of parent and child. See upon this, *per Lord Eldon* C. 18 Ves. 153, 154.

(9) Query if *Blake v. Leigh*, before Lord *Hardwicke*, be not the case alluded to? Ambler, 306.

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ciples respecting the ademption of legacies. The entries in Mr. *Powell's* books appear, upon evidence, to be mere entries of the disposition of his money. From 1776 to 1783, there appear to be similar entries of presents to Mr. and Mrs. *Comyn*, even down to the minutest articles. Those relied upon on the other side, are such as mention the word portion or fortune; when these tally with the settlement, and one of them is on the same day, could he mean more than an entry of his expenditure?

As to the codicil, it has been held, that where one has given a legacy by a will, and afterwards has paid the money and has added a codicil, he was aware of the will; and therefore that it amounts to a re-publication, *Roome v. Roome*, 3 Atk. 181.

With respect to the chaplainship, it is impossible that should have been considered as an integral part of the sum: it appears by *Powell's* letter, it was not intended as matter of account.

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There is no case where a stranger is considered as paying a former bounty by a latter; this is only the case where there is a prior burthen or obligation: the ground of the presumption, which arises from the prior obligation, fails in the case of a stranger. If this was not so, it would amount to a determination, that a man could not give two bounties unless he expressed his intention so to do. Mr. *Hargrave* has argued, that if *Harriot Charlotte Stables* had been his daughter it would be a [*] satisfaction, and enquires whether the Court will determine it otherwise in the case of a stranger. If the law has laid down the distinction it cannot be helped, but there is the reason of the law so laying it down, that it is in respect of the prior obligation. In *Grave v. Lord Salisbury*, (*ante*, vol. i. p. 425.) I understand your Lordship laid down the rule. That case was very like the present: it was there argued that the gifts, to the amount of 4000*l.* were an ademption *pro tanto*, your Lordship held yourself obliged to follow the rule as laid down, and there is no case where the second gift has been held an ademption, but where there was a prior obligation. Another distinction has always been taken, that the Court requires, in order to construe it a satisfaction, that the second gift should be of the same extent, of the same kind, and payable at the same time. A stronger circumstance still has been relied upon, where the gifts have been in the same or different instruments. In *Hooley v. Hatton*, (*ante*, vol. i. 390. *n.*) will and codicil were, for this purpose, held to be different instruments, which has been since affirmed in *Foy v. Foy*, (cited in the same note, p. 392.) If this be a gift by different instruments, it comes within the rule of *Hooley v. Hatton*. Mr. *Hargrave's* cases are none of them upon the naked point; *Hoskins v. Hoskins*, *Hartop v. Whitmore*, *Norton v. Norton*, all are cases of father and child. *Chapman v. Salt* went entirely upon the proof, *Spink v. Robins*, upon the point that bonds upon a contingency were not a satisfaction. In *Chidley v. Lea*, Pre. Ch. 228. the several gifts were all decreed; and *Grave v. Lord Salisbury*, determined that it must be the debt of the legatee himself, in order to be satisfied by the legacy. His argument strikes the word *portion* out of the entry, and inserts the word *legacy*, and extends to a case where there was no prior obligation, and indeed that it shall always be a satisfaction where the party has not expressly said, it shall be an addition. The inference of equality from the sums given to the nephew and niece drops, for their shares, in various circumstances, will be different, which leaves the case upon the principles already argued from.

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Mr. *Ambler*, on the same side. — The principle of ademption is confined to a portion given by a parent. It proceeds on the prior obligation, *Ward v. Lant*, Pre. Ch. 182. *Watson v. Lord Lincoln* [*Ambler*, 325.], 9, 10 August 1756, upon Mr. *Pelham's* will, where, [*] Mr. *Pelham* having four daughters, appointed 10,000*l.* over which he had a power under

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under his marriage settlement, among his daughters, excepting Lady *Lincoln* (whom he had advanced), and also gave his personal estate among his other daughters, likewise excepting Lady *Lincoln*. On the 28th of *August*, 1752, his daughter, *Grace*, married Mr. *Watson*, and Mr. *Pelham* gave her 20,000*l.*, by applying part of the 10,000*l.* and other means, for her fortune; and the question was, whether the legacy given by the will was satisfied by the portion. Lord *Hardwicke* gave two reasons for the rule. 1st. That the Court leans against double portions. 2d. That a portion is a payment of the debt of nature; therefore, being of opinion that the gifts were by way of portion, he decreed that it was a satisfaction of the legacy: but as to the 3d part of the residue of the personalty, also the real estate devised, it was not a satisfaction of those. From this case, it appears that the subsequent gift, in order to be a satisfaction of the legacy, must be a portion, and the doctrine does not apply to a person standing *in loco parentis*, *Shudal v. Jekyl*. In this case the father is alive; that circumstance is taken notice of in *Roome v. Roome*, or some of the cases. The present is the case of a person no way related.

2dly. With respect to the effect of the codicil. Such a codicil as this will set up a revoked will. The circumstances necessary to make a codicil set up a former will, are, that it should be annexed to, or referred to, by the will, *Wentworth's Executor*, 24. Rolle Abr. 618. Cro. Eliz. 493. So, by adding any thing to the will, or by appointing a new executor, 2 Vern. 209. *Alford v. Earle* (see 3 Wms. 168.)—Case upon Sir *George Downing's* will. No specific form of words is necessary to such a codicil. Suppose he had said, *I confirm my will*, there could not have been a doubt that it would be a re-publication, and would pass after-purchased lands: *Acherly v. Vernon*. There is no difference whether the whole will be revoked, or only a part of it; in either case, the codicil will set it up again. It has been a question whether a mere codicil of personalty should set up the will: In *Gibson v. Rogers*, that was one of the questions; the other was whether, being of personalty alone, it must be attested by three witnesses, in order to amount to republication. In *Potter v. Potter*, which was before Sir *John Strange*, Lord *Hardwicke* differed from Sir *John*, and held that the codicil of personalty republished [*] the will. In *Jackson v. Hurlock* (10), 7, 8. 24th November, 1764, Sir *John Hartop* devised estates to Mrs. *Marsh*, whom he afterwards married, and made a settlement upon the children of the marriage (there were, however, no children). He afterwards made a codicil to his will, attested by three witnesses. The settlement was held a revocation of the will, and the question was, whether the codicil was a re-publication of it. Lord *Northampton* held it to be a republication. † The words of the codicil in that case were “This is a codicil which I desire to be annexed to, and taken as part, of my will,” and he afterwards went on and directed, that in case any taker under the will should disturb the provisions of it, they should forfeit their interests.

Mr. *Madocks* and Mr. *Selwyn* for the trustees, cited *Cuthbert v. Peacock*, 2 Vern. 593. followed by Lord *Harcourt*, in *Cranmer's* case.—The deposit may be a *donatio causâ mortis*, though not given in immediate prospect of death.

Mr. *Simeon* for Mrs. *Durell* (late *Ann Roberts*).—This is not a testamentary gift, because it has never been exhibited in the ecclesiastical court. It must stand either upon the nature of the gift itself, or upon

† *V. Doe* on the demise of *Pate v. Davy*, in Cowp. 158.

(10) *Ambler*, 487. and 2 *Eden Cases*, Lord *North*. 263.

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the evidence of Mr. *Cleaver*, and it may be rather a doubtful question how far the parol testimony of the trustee ought to be admitted to regulate the trusts; upon the words, as written, they seem to convey an interest to all the donees in common.

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Mr. *Scott* in reply.—I am content to agree that the rule of satisfaction, as between parent and child, is a rule of presumption, not a rule of law. It is, certainly, possible for a stranger, how little soever related, to put himself *in loco parentis*. Mr. *Powel*, in the present case, who was a stranger, did so put himself, and provided for Miss *Stables*. I do not admit, that, in such a case, the presumption of law applies. The cases of *Haynes v. Mico*, and *Devese v. Pontet*, (cited Pre. Ch. 8vo. ed. 240. n.) have established the distinction. In *Haynes v. Mico* (*ante*, vol. i. p. 129.) your Lordship was first of opinion that the legacy was a satisfaction of the debt; but, upon consideration, held it was not so. In *Devese* [*] v. *Pontet* (11), Rolls, November 15th, 1785. (reported in Mr. *Finch's* edition of *Precedents in Chancery*, 240 note,) the disposition by the will was held not to be a satisfaction of the marriage articles, not being *ejusdem generis*, or of equal value. The rule is a rule of presumption of evidence, which will give way to evidence proving the contrary. If it should appear that the testator intended the subsequent gift as a satisfaction, it must operate as such, even though it were smaller than the former gift. The rule, as between parent and child, that there being a debt of nature, he can only do what is just, not what is bountiful, is a harsh rule: it is not, in that case, limited to being *ejusdem generis*, or equally beneficial, but to its being a portion or provision. The same rule of presumption applies to this case, because *Powel* put himself *in loco parentis*. The cases of *Shudal v. Jekyl*, *Robins v. Pope*, and *Roome v. Roome*, show that the grandfather, though he does not *primâ facie* stand *in loco parentis*, may place himself in that situation, and that, if he does so, the rule will apply. So, if a stranger puts himself into the same situation, why should not the rule apply to him? The question then becomes simply this, whether Mr. *Powel* meant to put himself *in loco parentis*? which, it appears, he did; but, even if he did not, it appears, from the evidence, that he intended to adeem the legacy. The cases seem all to proceed upon the intention of the party. *Shudal v. Jekyl* is a clear authority that a person may put himself *in loco parentis*, and that that circumstance will repel any presumption arising from his being a stranger. *Copley v. Copley* shows the Court has always held it to be a question of intention. *Duffield v. Smith*, 2 Vern. 258. proves the same thing; for, although the decree in that case was reversed, yet it is an authority to prove that it was considered as a presumption of evidence. There is nothing in that part of the argument which requires that the thing given in satisfaction should be *ejusdem generis*; the circumstance of its being so is only a presumption of evidence repellable by proof to the contrary. The cases cited for the defendants, only prove that the Court has determined upon the principle coupled with the circumstances of the respective cases. This brings me to the effect of the evidence. It does not follow that Mr. *Powel* meant differently as to Miss *Stables*, from what he did with respect to his nephews, because between them there was a survivorship. A part of the sum, the 4000*l.* is *ejusdem generis* [*] with the legacy, and therefore falls within the strict rule of satisfaction; and if not, the presumption results in the fullest manner possible from the entries: and this applies in the same way as to the annuity; the entry is in the same manner. . The only doubt therefore is, whether the evidence is not sufficient to prove the same as to the chaplainship.—Great stress has been laid upon the codicil, and cases have been cited which prove that in some cases a codicil

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is, in others that it is not, a republication—but in this case the codicil is merely the gift of a legacy to Miss *Roberts*.—The fair effect of the entries is, that he had paid the portion he intended.—With respect to the chaplainship, the provision for the husband operated to the benefit of the wife, *Salt v. Chapman*. With respect to the deposits, where such gifts are to be taken as *donationes mortis causæ* I always understood they must be in contemplation of death.

Lord Chancellor.—The deposit seems to be a mere gift to be divided between the parties. (12)

The only difficulty I find in the present case is, how to direct such an enquiry as shall bring the matter more fully before me, the enquiry directed must be, whether Mr. *Powel* advanced these sums in payment of Miss *Stables*'s fortune, and I confess it seems to be driven to the single question, whether the advancement was in discharge of the legacy. I narrow it thus, because I think the chaplainship must come under the same description as the presents, and I do not see that, under any of the cases, they can be held to be an ademption of the legacy.—With respect to the question of ademption, the case of parent and child is a presumption of evidence only, not a presumption of law: (13) as to its being considered as the payment of a debt, the law does not compel the parent to give the legacy, the Court can only mean a moral obligation, a laudable affection, which may exist in others besides a parent. Suppose Mr. *Powel* had said, in terms, I mean to make myself a parent, he could not have expressed it stronger than by disposing of the guardianship. How far the Court is justified in construing the gifts of parents with the rigour with which they have done is a different question; (14) Lord *Cowper* and Lord *Hardwicke* have turned the stream of those decisions, and have fixed the rule. In the present case if I determine one way, I am to determine that having given Miss *Stables* 6000*l.* by his [*] will, and, in the next year, taken great pains to settle what he gave her upon the marriage, in strict settlement, he at the same time, if he remembered his will, intended that 6000*l.* should go to the husband unsettled; for, if he had forgotten his will, I agree with the cases that the legacy is adeemed by the subsequent gift: a present provision of 5000*l.* being better than a legacy of 6000*l.* after his death, and remaining contingent during his life-time. The words he has made use of in his entries are *portion* and *fortune*: the word *portion* has been argued from, as having some pointed meaning, but I know no other meaning that it has but that of fortune, with which he has coupled it. (15) The quantity and the kind of the gifts have in many cases been held material, as showing the mind of the testator not to have the same view in the latter as in the prior gift, but, in the present case, I do not see any great probability of carrying the matter further than the question, whether the advancement was meant in satisfaction for the legacy.

This cause stood for judgment February 6, 1789, when Lord Chancellor expressed himself to this effect.

Lord Chancellor.—My opinion will require only a few words.

Mr. *Powel* by his will in 1775, gave to *Harriot Charlotte Stables*, a legacy of 6000*l.*, this legacy was not mentioned as being a portion. Af-

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(12) An inquiry was ultimately directed as to the deposit thus, "and as to the sums of 1500*l.* and 1000*l.* deposited by the testator in his life-time with the defendant R. C. and afterwards laid out in the purchase of Long Annuities in the joint names of the defendants R. C. and K. S. and the plaintiff P. D., It is ordered, that the Master do inquire into the facts and circumstances of the said deposit, and how the said sums or the interest thereof have or hath been applied, and by whom; and state the same particularly to the court, &c." R. L. fol. 284. b.

(13) See the doctrine stated per Lord *Eldon* C. in *ex parte Dubost*, 18 Ves. 151. 153.

(14) See per Lord *Eldon* C., 18 Ves. 153 & 154.

(15) See Lord *Eldon* C.'s observations on this, 18 Ves. 153, 154.

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terwards on her marriage 5000*l.* in the funds, stated in the settlement to be her portion, were advanced. It is in evidence that it was advanced by *Powell*. It is stated in the settlement to be her portion. He also conveyed an annuity to her use: there are entries in the books of *Powell*, by which it appears that he had made a calculation of the sums advanced as a portion. In 1783, he made a codicil to his will, by which 5000*l.* were given to a niece unborn at the time of making the will. The question is, whether the advancement of 5000*l.* on the marriage of the defendant is an ademption *in toto* or *in part* of the legacy. A legacy *prima facie* is presumed to be a bounty to the legatee, and must stand as such *donec probetur in contrarium*. The word portion, although applied in the case of a parent, shall not be so applied to the gifts of other relations or friends (15): it has been determined not to extend to a grandfather. Whatever foundation there might be for the [*] original application of the rule, that the advancement of a parent shall not be a further gift, it is not now to be disputed: but it is obvious the intent of the testator is as often disappointed as served by it. Those cases stand on their own ground; this case is an attempt to make a friend's legacy satisfied by a subsequent advancement. There are cases where a man may describe himself so, that the gift by the will, and that in his lifetime, may be intended for the same purpose, but it must appear (16) that he meant to put himself *in loco parentis*; for there are no cases where it has been so held, if the second gift appeared to be *diverso intuitu*. (17) I have gone through all the cases, and it appears to be the result of them, that where a stranger gives a legacy by will, and afterwards gives a sum without any evidence that it is intended for the same purpose, it is not taken as a satisfaction; to make it so, it must appear, at the time of the gift, to be meant as an ademption of the legacy.

(15) See the preceding note.

(16) See *per Lord Eldon* C. 18 Ves. 152, 153.(17) See *Grave v. Earl of Salisbury*, *antea*, 1 vol. 425. 427.

[7 Feb.]

[*Vide* S. C.
antea, 338, and
the Editor's
notes.]

[In this case the defendants' admission was held to give the Court a jurisdiction it would not otherwise have assumed. The Master of the Rolls having assumed a jurisdiction on such admission, the plaintiff was held entitled to equitable relief, by the direction of an account; and His Honor's decree, merely retaining the bill for a year, to enable the plaintiff to try his title at law, was reversed.] (1)

Duke of LEEDS against The Corporation of NEW RADNOR.

(Reg. Lib. 1788. A. fol. 182.)

FROM the decree at the Rolls, (*v. ante*, 340.) there was an appeal to the Lord Chancellor, which stood for judgment, 7th February 1789.

Lord Chancellor stated shortly the substance of the bill, that the Duke's title was admitted by the answer, and his late Honor's decree, that the bill should be retained for a year, in order that an action of debt might be tried: and proceeded to this effect. On this case it has been argued for the defendants, that the remedy is not in this Court, for that an assize or action of debt would lie for the recovery of the rent. On the other hand a great many cases were cited by which it had been determined, that there was a remedy by bill in this Court, [even where there was no cross account;] a case was cited from *Atkins* (1 Atk. 598.) that this Court had given relief where the remedy at law is lost or become very deficient. In the Duke of *Bridgewater v. Edwards* (4 Bro. P. C. 139.) the lords proceeded on the ground that the premises were uncertain, [although the plaintiff there denied the whole case of the

(1) See the facts, *antea*, p. 338, 339. and the notes. See also *Bouservie v. Premium* *antea*, vol. i. 200. and the Editor's notes.

plaintiff.] *Holder v. Chambury*, 3 Wms. 256. was a bill for a quit-rent, [*] and to hold a down discharged of the right of common. Lord King dismissed the bill as to the down; Lord King said such a bill for quit-rents was proper, where the lands out of which they issued are uncertain. 3 Peere Wms. 148. (*North v. Earl and Countess of Stafford*) was a bill for quit-rents; it is the only case, in which a demurrer has been allowed: Lord King said, that had there been no demurrer, the Court would have relieved, and Mr. Peere Williams adds a quære as to the demurrer being good. In *Finch*, 241. the Master of the Rolls gave the whole relief prayed. *Berkley v. The Earl of Salisbury*, it was a case of a rent issuing out of a portion of tythes, the Court relieved because there could be no distress upon tythes, 1 Cha. Ca. 121. the Court gave the relief prayed. (2) In this case the decree is not tenable, because the defendants have by their answer admitted the plaintiff's right, and the Court, by retaining the bill for a year, has admitted that the relief lies in equity. To send it to law, only to try whether there is a remedy there, would not be that measure of justice which the Court ought to give; therefore the account must proceed.

Decree at the Rolls reversed and Decree for an account pronounced, with costs against all the defendants.

But upon a subsequent application to vary the [minutes of the] decree, it was so far varied, that it was taken only against the corporation; and the bill dismissed as to the individual defendants.

(1) So *D. Leeds v. Powell*, 1 Ves. 171. & Supplement, 96.

DEBEZE against MANN.

(Reg. Lib. 1787. A. fol. 184. b.)

THIS cause (reported, *ante*, p. 165.) came on 7 Feb. 1789., to be reheard; upon a petition of the defendant the executrix of the testator stating that decree, and that they were aggrieved thereby, for that the sums received by *More* and his assignees ought to have been decreed to be a satisfaction for the legacy.

Mr. Mansfield and Mr. Miford again argued for the appellant.

[*] The bequest to Mrs. *More* (by her then name of Miss *Kitty Meredith*) of the mortgage bond of 1365*l.* is in order to fit her out for *India*, or to dispose of her in marriage. This part of the bequest is very material, as it brings the case expressly within the rule, that where the legacy and the subsequent gift are given for the same purpose, the gift is an ademption of the legacy. Here the testator certainly considered the legatee as his daughter, he calls her "Miss *Kitty Meredith*, now in his house" and meant the 1365*l.* as a portion. On this ground the defendants contend, she can only be entitled now to the 365*l.*, the difference between 1665*l.* legacy, and the 1000*l.* advanced as a marriage portion. When the cause came on, your Lordship declared the demand of the legacy to be a subsisting demand, unsatisfied by the subsequent advancement. The evidence which weighed with your Lordship so to do, was

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[S. C. *ante*,
168. and 1 Cox,
346. on the first
hearing.]

A legacy by will of 1350*l.*, then a portion of 1000*l.* and 600*l.* given on the marriage of the legatee, not a satisfaction of the legacy, a declaration being proved, by parol evidence, that the father intended a further provision. (1)

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(1) Lord Thurlow, in his judgment, *postea*, wholly disclaims proceeding on any such declaration; but Lord Eldon, C. observes that Lord Thurlow did, upon the first hearing, clearly act upon such a declaration of intention. *Vide in Trimmer v. Bayne*, 7 Ves. 517, 518. As to the general doctrine, see *Robinson v. Whitley*, 9 Ves. 577. *Et vide* 1 Ball & Beatt. 305. *Ellison v. Cookson*, *ante*, 307, *postea* vol. iii. 61. *Powel v. Cleaver*, *ante*, 500. 509, &c. *Ex parte Dubost*, 18 Ves. 147, 148. 151, &c.

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that of *More*, the father of the bankrupt, stating a conversation concerning the marriage, in which *M'Guire*, the father of *Mrs. More*, said "he could only give her (*Mrs. More*) 1000*l.* on her marriage, but there would be more hereafter, as his life was a bad one," or that he expressed himself to that, or the like effect. The question now is, whether that conversation is sufficient to rebut the general rule. — It is now settled, that upon questions of satisfaction, as being questions of intention, parol evidence is admissible, but the evidence, in the present case, is much too loose to counteract the general rule. The words of the evidence "that there would be more for her thereafter" will be satisfied by the 600*l.* which *M'Guire* paid after the marriage, as it expresses only an intention of giving her something more, not of doubling the gift, and the circumstance of being at his death is only the conjecture of the witness. At the time the father made his will, he had declared her portion to be 1365*l.* he did not mean it to be more. He afterwards on the marriage gave her 1000*l.* by the 400*l.* which *More* received, and by the note of 600*l.* which the assignees recovered; and he also advanced her 600*l.* in his life-time, by which means she had 1600*l.* which must be a satisfaction for the 1365*l.* which was intended by the will as her whole portion. In the case of *Shudal v. Jekyl*, the parol evidence which was made use of to rebut the rule was very strong: it was that the uncle would do something for his niece by will. But that is not the case here, therefore, it is exactly the case of a portion given by a will, and a subsequent portion paid by the parent. If, indeed, he had given nothing in his life-time, the question might have been open.

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[*] Lord Chancellor. — I cannot raise any great doubt upon the subject. — Every gift is, *prima facie*, a substantive gift. The Court has determined, that where it appears that there is a legacy given in a will, for a particular purpose, and another bounty has been afterwards given for the same purpose, it implies an intention of the testator to satisfy the former bounty. In this, there was great hazard of defeating, instead of satisfying, the testator's intent. Courts of justice can infer little from the subsequent gift: they cannot judge of changes in the testator's bounty to the legatee, or difference arising from changes in his property. — Under all the circumstances, I do not think I followed a line which assured me I was satisfying the testator's intention. The old rule of satisfaction was a rigid one; even upon the rule as taken at present, I think, now more intentions are defeated than satisfied. In the present case, from the act in giving the second bounty, it was impossible not to apply it to the same cause with the first: but, if I am to believe the only witness produced, the testator, in the second gift, did not mean to perform the whole purpose; therefore, every other act of bounty will stand clear, and advancements to any amount, unless marked with the intent of being the ultimate bounty, will stand unaffected. This circumstance of giving 600*l.* without any expression of intention of performance of the bounty, cannot be so applied. — *I do not rest on the witness referring to an intention, in the father, to do more at his death, but the testator did not in the gift express any intention of satisfaction (2): therefore, the gift by the will is not satisfied.*

Decree affirmed.

(2) "It is clear, however, that Lord Thurlow did act upon such declaration of intention upon the first hearing." Per Lord Eldon C. 7 Ves. 517, 518. It may be observed, that Lord Thurlow must unavoidably have found it very difficult to surmount such an impression once entertained; and that it seems difficult to rest the decision on the mere want of a declaration, that the gift should be a satisfaction, as here reported. The general doctrine was, and is, that a gift from a parent to a child shall be deemed a satisfaction without any such declaration. Vide per Lord Thurlow, *antea*, vol. i. 427. *Ellison v. Cookson*, *antea*, 307. 309. *et post*. vol. iii. 61. *Ex parte Dubost*, 18 Ves. 147, 148, 151, &c.

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COOTE against COOTE.

(Reg. Lib. 1788. A. fol. 427.)

THE late Sir *Eyre Coote*, K. B. made his will bearing date 9th May, 1778., by which he made certain provisions for his wife, the defendant *Lady Coote*, and gave several legacies, particularly one of 2000*l.* to be laid out on government securities for *Louisa Coote*, (since deceased,) to be transferred to her at twenty-one, and in case she should die, to be invested in land, [*] and settled in such manner as was directed with respect to the residue, and he devised his *Irish* estate to be sold, and the money, together with the residue of his personal estate, to be laid out in lands, to be settled to the use of his brother the Dean of *Kilfenora* (the plaintiff), for life, remainder to *Eyre Coote*, the plaintiff's second son, for life, remainder to first and other sons of *Eyre Coote*, remainder to the plaintiff's eldest son, for life, with divers remainders over.

Where a second codicil appears to be only a repetition of a former (with the addition of a simple legacy) the legacies are not doubled. Parol evidence read, to show they were intended as accumulative. (1)

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Soon after making this will, the testator went abroad, to the *East Indies*, and on the 9th of *October*, 1780., he made a codicil to his will, by which he confirmed the same, and thereby gave to the defendant *Lady Coote*, 10,000*l.*, to be paid within twelve months after his death, and gave several other legacies, and appointed the plaintiff *Dean Coote*, "residuary legatee to the sums of money which should remain after the payment of his debts and legacies." (2) On the 14th *December*, 1780., he made another codicil, by which he gave *Lady Coote*, 10,000*l.*, and repeated all the other legacies in the former codicil in nearly the same terms as were used in the former codicil. He added a legacy of 5000*l.* to his god-daughter, *Ann Monkton*, and appointed his brother, the plaintiff, residuary legatee. The codicils were wrapped together in a sheet of paper.

The present bill was filed by the plaintiff, as executor and residuary legatee, praying that the defendant, *Lady Coote*, and the other legatees might accept of the legacies given to them in the former codicil, in full satisfaction of their legacies.

Three questions arose:—

1st. Whether the legacies under the codicils were or were not accumulative.

2d. Whether the residuary legacy to the plaintiff, by the codicil,

(1) Lord *Thurlow* observed, in *Ridgels v. Morrison*, ante, 1 vol. 390, 391, that "the rule laid down in *Hooley v. Hatton* (*ibid.* note, and 2 Dick. 491.) seemed to be, that "where a testator gives a legacy by a codicil as well as by a will, whether it be more, less, or equal to the same person who is a legatee in the will, speaking *simpliciter*, it is an accumulation; and it is incumbent on the party contesting it to produce evidence to the contrary." Such presumption is, however, a very slight one. *Vide ibid. postea*, 529. *Per M. R.* in *Allen v. Callow*, 3 Ves. 292, 293, 294. *Barclay v. Wainwright*, *ibid.* 465, 466. *James v. Simmons*, 2 H. B. C. 213. *Osborn v. D. Leeds*, 5 Ves. 381, &c. See the whole doctrine of the repetition of legacies, and the cases set forth in Mr. Roper's very useful work on Legacies, 1 vol. 491, 492, et seq. *Foy v. Foy*, and *Brillie v. Butterfield*, 1 Cox, Ca. Ch. 163. 392.

(2) Lord *Redeale*'s notes observe on this, that similar expressions were held to pass the whole residue of the personal estate in *Lynn v. Dubois*, Mich. 1777; in which such a bequest differs from those of *Davers v. Dewes*, 3 P. W. 40., and *Attorney General v. Johnstone*, Ambler, 577.

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revoked the residuary clause in the will, or he is a trustee, and bound to lay out the residue to the uses in the will.

3d. With respect to the legacy to *Louisa Coote*, who is dead without attaining her age of twenty-one.

[*] The cause came on to be heard 12th April, 1788, and was heard that day and the 18th.

Mr. Attorney General (*Arden*), Mr. *Madocks*, Mr. *Bragge*, and Mr. *Richards*, for the plaintiff.

It is true there are authorities that where a testator gives *simpliciter* the same, a greater or a less sum to the same legatee, in two distinct instruments, it has been held to be accumulative, and that the legatee shall take both the sums. Such were the cases of *Hooley v. Hatton* (*ante*, vol. i. p. 390. n.) and *Ridges v. Morrison* (*ibid.* 389.) but that is only a *prima facie* rule, and any circumstances accompanying the case will explain and rebut it. In *Hooley v. Hatton*, particularly, Chief Baron *Smythe* observed, that it was totally unexplained, there was no internal evidence whatsoever; but where circumstances have occurred, even though slight ones, they have been considered as explaining the testator's intention. In the Duke of *St. Alban's v. Beauclerk*, 2 Atk. 636. the codicils were held to be the same, from the internal evidence, and it was much relied upon, by Lord *Hardwicke*, that the codicils began there, as they do here, by affirming the will: the internal evidence of their being the same legacies, was not stronger, in that case, than in the present. It is, indeed, the natural presumption, that, where there are two codicils, the one is only a repetition of the other. Lord *Hardwicke*, in that case, took the line of the civil law, that where both the gifts are in one instrument they are not accumulative, and that their being in two instruments made no distinction. In *Hooley v. Hatton*, the Lords Commissioners endeavoured to reconcile his opinion with that of former judges. *Masters v. Masters*, 1 Wms. 241. was the first case in which more than one legacy, repeated, was held accumulative; but all the cases where they have been so held were cases of a will and a codicil, and not of two codicils, as in this case, which is very different. Here each begins with affirming the will, but the second codicil has no words referring to the former codicil. The internal evidence arises from the persons taking as objects of his bounty. The first objects of his bounty are those mentioned in the will; now there are none of them comprised in the first codicil, nor in the second: this shows it did not, as will be argued, arise from an increase of fortune, which would most probably have extended to the legatees in the will, as well as those in the codicil; but the [*] sole intent of the second codicil was to introduce the legacy to Miss *Monkton*, and, as he had reserved a power only of making a codicil, he might think himself confined to one, and therefore repeat the other legacies. The repetition of the residue strengthens the argument, for he could not mean to give two residues. As to the codicils being found together, that must always be the case where the question arises.

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Mr. *Scott* and Mr. *Mitford*, for the defendant, Lady *Coote*. — The defendant claims two legacies of 10,000*l.* each, under the will of the late Sir *Eyre Coote*. The first objection made by the plaintiff is, that there is no case where double legacies have been decreed under codicils; but in the reason of the thing, it can make no difference whether the legacies are given in a will and codicil, or in two codicils; and the cases, especially the Duke of *St. Alban's v. Miss Beauclerk*, suppose that double legacies may be given by codicils; but, in fact, the point has been decided in the case of *Foy v. Hollis*, at the *Rolls*, the 1st of February, 1785, where there were three legacies given to Dr. *Jebb*, in different instruments, and his Honor thought him entitled to them all, though he refused

refused to take more than one legacy. The rule laid down in *Ridges* and *Morrison* is agreed to be the true rule: it is, that "where a testator gives a legacy, by a codicil as well as by a will, whether it be more, less, or equal, to the same person who is a legatee in the will, speaking *simpliciter*, it is an accumulation;" and the number of the legacies can make no difference whether a cause be, or be not, assigned for the second legacy; if it be not the same cause as is given for the first, it will not prevent its being accumulative. It has been argued that the repetition of a number of legacies would afford an argument against their being accumulative; but the Court never can go on so slight a ground. It is true where specific things are given twice, the second legacy cannot take place; but that is a very different case from the same sum, which may well be paid. Nor is the equality of the sums any objection; there is no inconsistency in the testator's intention to give a second sum, to the legatee, equal to the former. Then, with respect to the internal evidence, great stress is to be laid on the words *this is a codicil* to my will, joined with the reservation in the will of what he should give by *any* codicil. Then, it is objected, that by the second codicil he only confirms his will, not the former codicil, but as the will [*] adopts every codicil, it was not necessary for him so to do. The case of *Foy v. Hollis* (3), was, in fact, stronger than this, for there the last act was a will. Then with respect to giving the residue again; that of itself is certainly not sufficient to show that he meant merely to repeat, not to double, the legacies. Nor does the legacy to Miss *Monkton* afford any argument; for, unless he meant to double the other legacies, the easier way would have been to have given her legacy by a separate paper. Sir *Eyre* keeping both the codicils by him, seems conclusive evidence of his intention as it differs this from all the other cases. In the other cases, destroying either codicil would have defeated some of the legacies; but that was not the case here, as the second codicil comprised all the legacies contained in the first. There is another circumstance in which this varies from the Duke of St. *Alban's v. Miss Beauclerk*. In that case there was a formal reservation of a power to make a codicil. Lord *Hardwicke*, from thence, considered all the codicils as forming one instrument.

The next question is, whether parol evidence can be admitted. This is not a question of construction, but a question of evidence of the intention of the testator. Where there is but one instrument, it is generally a question of construction; but where there are two instruments, it is a question of evidence as to the operation of the latter. Here, all that is attempted to be proved by the plaintiffs is that it is to be presumed the testator meant, when he made the latter codicil, that the former should no longer have any force; but this is only a presumption, and, of course, repellable by evidence, it is not what the civilians call *presumptio juris*, but *presumptio hominis*. In *Bibb v. Thomas*, 2 Blackstone's Rep. 1043. evidence was admitted that the will was fraudently preserved. So the presumption of revocation of a will arising from subsequent acts, as in the case of a marriage, is repelled by parol evidence. *Brady v. Cubitt*, Dougl. 30. where *Legg v. Legg*, 1 L. Raym. 441. and *Lake v. Lake*, 1 Wils. 313. were cited; in *Campbel v. Lord Radnor*, the evidence was not only admitted, but decided the cause; in *Debeze v. Mann*, (*ante*, 165. 519.) parol evidence was admitted, to prove that a sum of money advanced on marriage was not a performance of a legacy. The parol evidence, here, is first, that the testator had, or understood he had, an encrease of fortune, between the making the first and second codicil;

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(3) It has lately been reported, 1 Cox, Ca. Ch. 163.

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[*] and that he expressed, at the time of making the second, an intention of increasing the provision for his wife.

2. With respect to the residue, there is no doubt the intent was, that the Dean should be a trustee to the real uses of the will.

3. As to the 2000*l.* legacy, which has lapsed, it must be laid out in land to the uses. The revocation of the residue, could not revoke the legacy of 2000*l.*, *Reay v. Hopper*, Rolls, Mich. 1785.

Mr. Attorney General, Mr. Maddocks, and Mr. Bragge, resisted the reading the parol evidence.

In the case of a suit brought by the next of kin against the executor, the executor may read evidence of the declarations of the testator, then the next of kin may read evidence; but the executor has the election to rest the case on the construction of the will, or on the evidence of declarations. Here the legatee produces two instruments, each containing a legacy to him; the executor may read evidence, because it is in support of his legal title: but it has never been decided that the legatee could read evidence in support of his equitable title. The general rule is, that nothing can be read to explain the written will, and the case of the executor is an exception to that rule: but the exception has gone no further. Where there is an *ambiguitas latens*, parol evidence has been always admitted, as to demonstrate the person when doubtful: so, in the case of satisfaction, to show that the inference is wrong. But if the defendants mean to lay it down as a rule of law, that wherever legacies are given in two instruments, they are to be doubled, it would be to read evidence to support a rule at law. The circumstances of the party are not properly the subject of parol evidence: it was thought dangerous to admit it in *Fonnereau v. Poyntz*, (vol. i. p. 472.) It is still more dangerous to admit declarations of the party, as parties sometimes wish to deceive those about them. Although such declarations were admitted in the Duke v. the Duchess of Rutland, 2 Wms. 215. yet they were refused in the case of *Brown v. Selwyn*, Forrest. 240.

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[*] Lord Chancellor said—When it is laid down that the evidence is admissible on one side, it must be so on the other: it cannot be admissible for the executor, and not admissible against him. The question whether, by giving two legacies, the testator did not intend the legatee to take both, is a question of presumption, *donec probetur in contrarium*, and will let in all sorts of evidence! Where the presumption arises from the construction of words simply, *quod* words, no evidence can be admitted.

The parol evidence was read, but did not prove the points to which it was adduced.

Mr. Lloyd, for *Eyre Cootz*, the residuary legatee in the will.—The question is, whether, by the codicil, the testator meant to substitute the father for the son.

The words only give a special, not a general, residue: it is not sufficient to pass all sorts of property, though it will carry ready money, mortgages, &c. it will not comprehend money in the public funds, chatels real, coaches, carriages, &c. Gilb. Eq. Rep. 200.

Mr. Attorney General in reply—The case of *Hooley v. Hatton*, though supposed so to do, does not lay it down as a rule, that a legacy in the codicil, to the same person who has one in the will, must be accumulative. The case did not require any such rule, the words there were “I add this codicil to my will.” In *Ridges v. Morrison* (4), the testator had his will before him, and there was the strongest presumption that he meant to give the legatee two legacies. In *Foy v. Hollis* (5)

(4) *Antea*, 1 vol. 388., *quod vide*.

(5) 1 Cox, Ca. Ch. 163.

there was very strong intrinsic evidence: the legacies to *Simpson* and *Knowls* there were in the will; but there is no doctrine, any where laid down, that the mere circumstance of the legacies being on different papers will make them accumulative; here they are in two papers, which are both codicils. With respect to an increase of fortune, the fact does not appear. That he did not destroy the former codicil, does not prove that he did not mean the latter to be in the place of it.

The next question is upon the residuary clause. This has been contended to be, 1st, a trust, 2d, a special residue. As to the first, it can hardly be serious. As a special residue, the case [*] cited seems as if it was of particular things; but money is a general term, and a residuary legacy means, *ex vi termini*, every thing that is left after the will is performed.

Lord Chancellor. — If the rule be that whenever two legacies are in different instruments, they must be accumulative, and no presumption can be admitted to prevent the accumulation, then it must be so in this case; but *if the rule be that it shall be open to circumstances to show, that the latter was meant only as a repetition, then I think this is that case.* (6) — I do not say this from small circumstances in the case, but from the repetition of all the legacies, and principally from the repetition of the residuary clause; and from them, I think that if there can be a case where one instrument can be held to be only a repetition of another, this is the case. — I have hitherto understood the result of the cases to be, that, *primâ facie*, both instruments speak [distinctly] for themselves, but that the probable inference that the testator meant two legacies may be repelled by circumstances. (7) — There is a great variety of opinions in the books. Even in the case of only one instrument, it has been held that slight circumstances, as a cause given for the second gift, will make it accumulative. The bent of my present opinion is, that this is a repetition; if not, that there never can be a case where a second instrument can be otherwise than accumulative.

This cause came on for judgment, 9th February, 1789, when

Lord Chancellor, spoke to the following effect, — There is but one point in this cause, and that will be a short one. Sir *Eyre Coote*, by his will, had disposed of several real estates and of his personal estate. — Afterwards, going to *India*, he made a codicil to his will, dated 9th October, 1780, beginning with the words “This is a codicil to the will, &c.” by this codicil he ratified his will and gave a legacy to his wife of 10,000*l.* he gave several other legacies, and made his brother, the Dean of *Kilfenora*, residuary legatee. He afterwards went to a different part of *India*, and there made another codicil in December, 1780, in the same words with the former, and the residuary legacy the same: it contained only one alteration, the legacy to Miss *Monkton*. — It is insisted, by the legatees, that these are duplicated legacies; on the other hand, it is argued that the second codicil is a mere repetition. — All the cases were gone through, in argument, from the [*] civil, the canon, and our own law. I do not repeat them because I refer entirely to the argument of Mr. Justice *Aston*, in *Hooley v. Hatton*, (*ante*, vol. i. 390. n.) [“who went through the doctrine of them all with a particularity, method, and sufficiency, seldom to be met with; and from that argument, I take it “was the result (8),”] that when the same legacy is given in a will and a codicil, the Court generally takes it as [accumulative, (9)] but that

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(6) See the first note to this case.

(7) See the last note to this case.

(8) From Mr. Cox's MS. note of the Lord Chancellor's judgment.

(9) That there was the most material mistake in the former editions, seemingly by misprint, at this place, where the words “one legacy” were inserted instead of the contrary, as above, is most evident, from the case referred to, and *Ridges v. Morrison*, wherein it is cited;

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that the Court has not considered the presumption as very strong, but slight circumstances have been held to control it. Where it is evident the testator meant to repeat the legacies they are not duplicated. I think here the testator meant to leave but one codicil, and only to add the legacy to Miss *Monkton*. It would be extraordinary he should repeat exactly the same legacies to persons standing in so different degrees of relationship to him as the several legatees, and that the residuary clause should be exactly the same in both. The last codicil, therefore, alone ought to stand.

Decree for the plaintiff.

cited; as well as from the other authorities referred to in the first note to this case. Lord *Thurlow* admits the rule as above, even in the preceding page.

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PEARSON against The Bank of ENGLAND. [Feb. 8, 9, & 10.]

Bank Costs.
Bequest of
stock to execu-
tor for life, re-
mainder to
M. W. the ex-
ecutor having
bought M. W.'s
reversionary in-
terest, and the
Bank refusing
to allow a trans-
fer, the Court
ordered a trans-
fer to be made
accordingly;
but nevertheless
gave the bank
their costs. (1)

IN this case, *Lucy Porter*, by will gave stock to *Pearson* for life, remainder to *Mary White*; and made *Pearson* executor. *Pearson* having bought *Mary White's* remainder, a conveyance was made to him of the remainder in the stock, and *Pearson* and *Mary White* joined in an application to the Bank, to transfer the whole into *Pearson's* name, and a power of attorney was procured and filled up for the same purpose. The Bank refused to make the transfer, and, upon bill filed, the Court decreed the Bank to suffer the transfer to be made. The question then was whether the Bank should have costs. — Lord *Chancellor* took time to consider of it, and this day ordered the Bank to be paid their costs.

(1) Notwithstanding three similar decisions, at different periods, succeeding the principal case, all which are cited in the last of them (*Austen v. Bank of England*, 8 Ves. 522, 524, &c.) it may now be very questionable whether the Bank would, at this time, be allowed their costs on such a resistance: for Lord *Eldon* determined, in 1809, after mature consideration of all the cases, that the Bank of England are not to be considered as trustees, or to involve themselves in trusts; and that if they would be liable at law, they have no equity to resist a fair demand for a transfer. See in *Lunn v. The Bank of England*, 15 Ves. 569, &c. 581. 583. Lord *Thurlow* himself, in the *Bank of England v. Moffat*, post. 3 vol. 259., and Lord *Loughborough* in the *Bank of England v. Parsons*, 5 Ves. 665. determined to the same effect in the case of a residue; in which last the Bank was ordered to pay the costs. But the *Bank of England v. Lunn* (ubi supra,) and Lord *Eldon's* reasoning there, apply with equal force to specific bequests. See particularly 15 Ves. 581.

[Vide S. C.
ante, 352. 376.
and the notes
passim.]

HANBURY against HANBURY. [Feb. 10.]

(Reg. Lib. 1788. A. fol. 388.)

The former de-
cree, in this
cause, affirmed.
The cross bill,
insisting that
the portion by
the settlement
was satisfied by
the bond, dis-
missed with
costs.

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A PETITION of re-hearing having been presented by the defendant (*vide ante*, 352.) it stood for this day. In the mean while a cross bill was filed by the defendants in the original [*] cause, against the plaintiffs therein, praying, among other things, that *Henrietta* and *Frances Hanbury*, the plaintiffs in the original bill, might be compelled to deliver up the bond, from *John Hanbury* to *Tracy* and *Dagge*, to be cancelled, and that, upon payment on behalf of the plaintiff, of so much of the 2000*l.*, as remained due to *Henrietta* and *Frances* upon a deduction of the payments of 400*l.* a-year, made by the plaintiff to them, the personal representatives of the surviving trustee in the settlement might convey the term for the benefit of the plaintiffs. — For this purpose, the cross bill

bill stated the settlement of 1734, and the other facts stated in the original bill, but charged that the bond was delivered to *Dagge*, to be kept as the friend to *John Hanbury*, until *Henrietta* and *Frances* should attain their ages of twenty-one, and execute releases of their other fortunes; it also stated an examination put in by *John Hanbury*, in the cause, by which it appeared that *Capel Hanbury's* personal estate was to a great amount, and that some agreement was come to with respect to the allowances to *Henrietta* and *Frances*, in which *John Hanbury* declined making the allowances in the terms of the bond, but, being inclined that they should have allowances, he came to a resolution to allow *Henrietta* 200*l.* a-year, and *Frances* 100*l.* a-year, and to let the allowance commence from 7th *December*, 1766, (being one year from the death of *Capel Hanbury*), and he paid, about 8th *June*, to *Henrietta* 300*l.* for a-year and half's allowance, to the 7th of that month, and to *Jane Hanbury* (the mother) 150*l.* for one year and half's allowance for *Frances*, and from that time paid the allowances in those sums, and at those times, and not under the bond, till his death; that, since his death, the plaintiff had paid 400*l.* a-year, under an agreement that it should be without prejudice to the question in the cause. It further stated the copy of the bond delivered to *Henrietta*, and the suit thereupon commenced, and that, since, the original bond had been found, among *Dagge's* papers, and delivered up to the defendants: it, therefore, charged that the same was not delivered to *Dagge* absolutely, but as an escrow to be delivered to *Henrietta* and *Frances*, upon their executing releases, and that the same never was delivered, but was found, together with another bond, for securing to *Jane*, the wife of *Capel Hanbury*, 300*l.* *per ann.* in lieu of dower, which had never been acted upon, he paying the 300*l.* a-year, on the 7th *June*, and 7th *December*, and not, under the bond, upon the 25th *March*, [*] and 25th *September*, in each year. It further stated several applications, conversations, and letters, in which *Henrietta* and *Frances* represented their fortunes as being 10,000*l.* each, or 20,000*l.* between them, and that the same were their whole fortunes, and never, during the life of *John Hanbury*, expressed a right to any further sums, and that *John* made the payment of 200*l.* — 100*l.* and 300*l.* *per ann.* not as being bound thereto by the bonds, but as allowances made by himself, which was expressed in the receipts given for such allowances, nor did *Henrietta* or *Frances*, during his life, ever claim the 20,000*l.* each. — The defendants, plaintiffs in the original cause, contended by their answer to the cross bill, that the 20,000*l.* for which *John Hanbury* gave the bond, was only in satisfaction of the fortunes which they claimed under the will of *Capel Hanbury*, and not with a view to their releasing any other claims, and that the payment of 400*l.* was considered as payment of interest on 10,000*l.* part of the 20,000*l.* secured by the bond, and that no release of their claims was even tendered to them, admitting they should have refused to execute such release.

Mr. *Solicitor General*, for the defendants in the original, plaintiffs in the cross bill, stated the decree in 1788, and the grounds of the cross bill. The defence on the former hearing was that the bond was a satisfaction for the settled fortunes, and that was the first question there made; the second was, whether the 20,000*l.* should be raised before an account was taken of the personal estate of *Capel Hanbury*. 1st. With respect to the question of satisfaction: this is very different from any of the cases in the books. The fortunes of *Henrietta* and *Frances* consisted of 2000*l.*, 3000*l.* and 5000*l.* The question is, whether the bond is a satisfaction for any thing more than the legacies. *John Hanbury* settled with his mother, and received the balance of the personal estate of his father,

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and, during his life-time, paid the interest of the 10,000*l.* according to the bond.

Lord Chancellor directed the other side to go on.

Mr. Mansfield, Mr. Hollist and Mr. Richards for plaintiffs in the cross bill, defendants in the original bill, stated the will by which 4000*l.* was to be *Henrietta's* whole fortune, and the several codicils thereto, with the language of the bond, by which the sums secured were to be considered as the portions of the daughters, and [*] allowances for their maintenance, and, therefore, must be taken as a satisfaction of the former portion by the settlement. Such seems to have been the opinion of the family. *Henrietta* came of age in 1770, *Frances* in 1780, yet the bill was not filed till 1788. No reason is given for that acquiescence on the part of the plaintiffs in the original bill. On the other hand, it seems to have been understood by *John Hanbury* that the bond was not executed absolutely, but on condition that the plaintiffs gave up their other claims. It would have been very improper on the part of the trustees to take such a bond from *John Hanbury*, and leave the other claim outstanding. The manner in which the bond was found, shows it was not to be given out, but upon such an event: it was found with another bond to secure the mother 300*l.* on the release of her jointure, which, never being released, that bond was never delivered out. It is manifest this was to be kept by *Dagge* for the same purposes, and the ladies never having given up their claims, the bond was never to be delivered out. There is something in the forming of the bond which shows that *John* recollected the claims; for the second sum of 10,000*l.* was not to be paid till the death of the mother, when the 3000*l.* and 5000*l.* would have fallen in: it is therefore, apparent he meant to be a purchaser of their claims. It is impossible to find a case in the books precisely the same as this, but, in its general principles, this Court leans against double portions. On the former argument, it was said, this could not be a satisfaction, because the portion comes from different funds, but in fact it comes from the same estate, and the 2000*l.* though not a personal debt of *Capel's*, is as much satisfied as the other claim, besides that argument does not apply to the 3000*l.* and 5000*l.* which are, in fact, charges on *Capel's* estate. The single question, in all the cases, is what the party meant, who gave the portion. By the will it appears, *Capel* only meant to give 20,000*l.* The bond shows *John's* idea was that it would fall on his estate, not the personal estate of his father. It is highly improbable that he could intend to give them the bond, and remain liable to the other claims. His examination shows he knew very little of the state of his father's affairs, for he thought the personal estate amounted to 16 or 17,000*l.* whereas it turns out grossly defective. Then, the conduct of the ladies speaks their opinion, their never making the claim during the life of *John*, their acquiescence, their declarations that their fortunes were 20,000*l.* [*] their receiving the allowances in a different manner from that prescribed by the bond, all show their claims satisfied.

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Lord Chancellor.—This case lies in a narrow compass (here his Lordship stated it.) As to the 4000*l.* which *Henrietta* was to have under the will, being her whole fortune, an observation was made on that subject; but there is an end to that observation, as she was, at the time, entitled to more.—The third codicil revoked the two former, it gave 20,000*l.* to the daughters; it was contended that this codicil was a satisfaction of the sum given by the settlement. These portions are consistent, being for the benefit of the child; in considering these wills, it is impossible to apply the doctrine of satisfaction in discharge of any of them. None of them can be considered as the ultimate provision intended by the testator to be made for his daughters. Then, with respect to the subsequent transac-

transactions, *Henrietta* filed her bill for her fortune; the 5000*l.* then was alone in demand. *John Hanbury*, by his answer, insisted upon the doctrine of satisfaction, the question then remained undecided; before any further proceeding in that suit, the bond was executed by *John*.—I lay no great stress upon *John's* examination, as it is not material. It is said that bond must be considered as gratuitous, I think it impossible to say, now, whether it was so or not. The sisters accepted of half their fortunes after the death of the mother, but it does not appear that they were to come out of the fund that would then fall in. From the time of executing the bond, 200*l.* a-year was paid for the maintenance of one child, 100*l.* a-year for the maintenance of the other: an allowance must have been paid them before the date of the bond, therefore the payment is referable to that, nothing is more clear than that referred to the will and codicils only. If the bond was intended as a satisfaction, the most natural step would have been for *John* to have taken a release of those claims, and a release from the trustees in the settlement, but it is clear it had no reference but to the will and codicils. I think the former decree right, and it must stand. A cross bill is filed to have the bond delivered up, but no fraud or circumvention is proved in obtaining of it. Two points are made, first, upon the receipts given for the allowances, but I do not place much reliance on the receipts. The two letters (expressing their fortunes to be 10,000*l.* each) are stronger, but they are not sufficient. 2dly, It is contended that the ladies have forborne applications for the [*] proportions, but it is not very natural to call their forbearance a non-claim. Timidity, natural to their sex, and a kindness to their brother, might prevent them from the demand; besides, they have stated in their answer that it was unpleasant to them to make the demand; that the brother was in bad health, and did not like to hear any thing on the subject; that besides he had agreed to a mortgage in order to pay off the claims. I am of opinion that the provisions in the cross bill have not been substantiated, therefore that it must be dismissed with costs.

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(1)

CATHERINE Culver, widow, (as surviving sister of *Elizabeth Shaffer*, widow, deceased) was seised in fee, in reversion of an estate, in the parish of *Tatsfield*, in the county of *Surrey*, and also of certain premises in *Westerham*, in *Kent*, (which last were of the nature of Gavelkind) subject to an estate tail in the premises, in *Richard Staple*, and also to a term, created by indenture of 2d *January*, 1754, to secure annuities, payable to *Sarah Dixie* and other persons. On the 23d *August*, 1758, a marriage being in contemplation between *Catherine Culver* and *James Hibbins*, M. D. an agreement between them, in writing, was entered

A woman, being about to marry, enters into an agreement with the future husband (without seal or stamp) by which her property is settled upon the survivor for life, with power to the wife to

dispose by will made after the marriage. She then immediately makes a will, by which she gives her property to the intended husband, absolutely, and afterwards (on the same day) she marries—the articles, resting in agreement, give the husband an equitable estate for life: but the will is revoked (not being protected by the power) by the subsequent marriage.

(1) There is no entry in Reg. Lib. of the original cause. The cross bill was dismissed with costs. (Reg. Lib. 1788. A. fol. 210. b.)

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into, but without stamp or seal, as follows, "Whereas a marriage is shortly intended to be consummated, between *James Hibbins*, of *London*, doctor in physic, and *Catherine Culver*, of the parish of *Romford*, in the county of *Essex*, widow, who is entitled to a considerable fortune, consisting of ready money, outstanding debts, stock in the funds, leasehold and freehold houses, estates in *London*, in the counties of *Middlesex*, *Essex*, &c.; also plate, china, linen and jewels. It is therefore agreed between them as follows, viz. that the said *Catherine Culver*'s fortune shall be settled, or remain, to their joint use for his life, or the life of the longest liver, and if she shall survive the said *James Hibbins*, the whole fortune, together with her plate, linen, china and jewels, to be settled to her own use, and that if the said *Catherine Culver* shall happen to die [*] first, then the aforesaid fortune to be at her own disposal, and both parties do agree that proper settlement deeds to the effect and purport above mentioned, shall be prepared between them, when the same can be conveniently got ready. A duplicate of this agreement was signed by *Hibbins*, but whether the original was signed by *Catherine Culver*, was matter of question. On the same day, and also previous to the marriage, *Catherine Culver* made and published her will, duly attested to pass real estates; and after certain usual introductions, among the rest, "as to her worldly estate and effects," she gave several legacies, and then came the following bequest; "I give unto *James Hibbins*, of *London*, doctor in physic, my intended and dearly beloved husband, the whole interest of all my fortune, during the term of his natural life," after which followed several legacies and devises, and, among the rest, several houses and farms at *Hammersmith*, in *London*, in the counties of *Surrey* and *Kent*, to *Dr. Hibbins*, and after several other legacies; she concluded with "as to the rest and residue of my estate and effects, I give and bequeath the same unto the said *James Hibbins*, whom I likewise make, nominate, constitute, and appoint sole executor of this my last will and testament." And upon the same day, but after the above transactions, the testatrix intermarried with the said *James Hibbins*.

In *February*, 1759, *Catherine Hibbins* died without altering or revoking her will, whereupon *Dr. Hibbins* proved the same in the ecclesiastical court, and entered upon, and possessed himself of, the real and personal property of his late wife. On the 9th of *October*, 1768, *Staple* died without issue, by which the estate-tail determined, and *Dr. Hibbins* entered upon the premises comprised in the deed of 1754, claiming to be entitled, subject to the annuity to *Sarah Dixie*, the only surviving annuitant, and continued in possession during his life; and by his will 7 *May*, 1774, gave to *James Lloyd*, the plaintiff in the cross bill, all his freehold estates situate in the city of *London*, the county of *Kent*, the county of *Middlesex*, and the county of *Surrey*, for life; with remainder to such children as he might leave in tail-general, with several remainders over to some of the defendants.

James Hibbins, died *October*, 1777, and *James Lloyd*, entered upon the real estate, and paid the annuity till the death of *Sarah Dixie*, in 1786, upon which event the term ceased.

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[*] The original bill was filed by *Richard Hodsdon*, the general heir-at-law of *Catherine Culver*, and *Thomas Hodsdon*, his younger brother, who, with him, were heirs in Gavelkind, against *Lloyd* and other parties, who had been in the receipt of the rents and profits of the estates in question, praying an account of the rents and profits of the estates, comprised in the indenture of 1754, come to the hands of *James Hibbins*, and of the rents and profits received since his decease, come to the hands of the defendants, and that what should appear to have been so received, subject to just allowances, and to the payments of the subsisting annuities might be made good out of the assets of *James Hibbins*,

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come to the hands of the defendant as surviving executor, and for the production of the title deeds.

The defendants filed a cross bill against the plaintiffs, in the original bill, praying that the wills of *Catherine Culver* and *James Hibbins* might be declared to be well proved, and the plaintiff's title to the real estate of the testator *James Hibbins*, might be declared, and that he might be quieted in the possession thereof.

The defendants *Richard* and *Thomas Hodsdon*, by their answer disputed the execution of *Catherine Culver's* will, and submitted that, if she did execute such will, her subsequent marriage was a revocation thereof, and claimed the real estates of *Catherine Culver*, *Richard* claiming the estate at *Tatsfield*, as general heir, and, together, with *Thomas*, the estate at *Westerham*, as heirs in Gavelkind.

The cause came on in *Michaelmas* Term, 1787, when the original bill being defective in point of parties; that cause stood over for want of parties, but the Court proceeded on the cross cause.

Mr. Attorney General, (*Arden*), and Mr. Mansfield, for the plaintiffs in the cross bill.

The plaintiff's claims arise under the devise of the residue in Mrs. *Culver's* will to Dr. *Hibbins*, and the whole question arises upon the power reserved to Mrs. *Culver*, to dispose of her property, and her execution of that power. The execution of the deed, by which the power is reserved is proved by proving the hand-writing of the witnesses; and that of *Catherine Culver* [*] herself, by comparison with other writings, and the question then is, whether the will is a good execution of the power, or it is revoked by the subsequent marriage in equity, as it would be at law. Nothing is clearer, at law, than that a woman making a will, even of personal estate, and marrying afterwards, the marriage is a revocation of the will. *Forse v. Hambley*, 4 Co. 60. In that case it seems to have been a doubt whether, if the wife survived the husband, the will would not revive, but not to have been doubted that it was a revocation if she died covert. But the question, here, is, whether, in a court of equity, a woman may not stipulate, that she shall have a power, either before or after her marriage, to dispose of her own property, and whether this is not the case of such a stipulation. If the stipulation was that she should have a power to dispose, before her marriage, of her property, certainly such a stipulation would be good (2), and wherever a married woman has such a power reserved to her, by deed before her marriage, she is considered in this court as being in the same state with respect to her property, as if she was still a single woman. 3 Atkyns, 709, in *Hearle v. Greenbank*. But it will be contended, that the power reserved meant that a disposition made after marriage, should prevail, and it certainly was intended in this restrained sense: but the gentlemen will then contend that it could not give efficacy to any act done before the marriage; whereas, under the agreement, it must give efficacy to any act after, or in contemplation of, or connected with, the marriage. In this case the will alludes to the marriage she was just about to contract, and was made with an express intent to execute the power she had just reserved by the contract; it was intended to operate in case she married. It is not necessary here to contend, that if a woman who had made a will before, and not in contemplation of, her marriage, should obtain the husband's consent, by such a contract as this, and make a will, that it would make that will good. But, here the husband agrees that she shall dispose by a future act, and she does dispose by a subsequent act, done in contemplation of the marriage, it will be difficult to contend that

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(2) See in the *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, &c., and *Southby v. Southby*, *ibid.* 612, &c.

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such a power is not executed by a will so circumstanced, or that it could be revoked, by the very act that was meant to give it validity, the marriage. The only question seems to be, whether the agreement did not go to any act to be done either before or after marriage. If it did, it seems clear such a power would be good. In *Wright v. Lord Cadogan*, 6 Brown's Plt. Cases, 156: an agreement before marriage was held sufficient to support the subsequent disposition.

[*] Mr. Scott and Mr. King, for the defendants. — The question is, whether sufficient has been done in this case to bar the heir-at-law of his legal right to the estate. No idea that Mrs. Culver entertained on the subject of these instruments can operate the least in the discussion of the question. If she had executed a will in the presence of two witnesses only, it might as well be argued, her intention was to disinherit the heir, and, therefore, the intention should take place. There are three questions arise in the cause. 1st, Whether the articles were ever executed by Mrs. Culver? 2d, What is the meaning of them? 3d, If they were executed, and the meaning of them is plain, what is the effect of them? 1st, The evidence for the plaintiff is in the common form, and therefore, if it stood uncontradicted, would be sufficient, but the evidence on the other side is very strong, to show that Mrs. Culver never, in fact, signed the articles. The will, itself, affords strong ground for the suspicion, as the estate is given to Doctor Hibbins, whether the marriage took effect or not. It has been suggested not to be necessary, that she should sign the articles as Doctor Hibbins signed them, but surely that will not do to defeat her heir, for which purpose it must be her act; there must be something tantamount to an equitable conveyance from the wife. 2d, What is the meaning of the articles? It is not contended that the will is a part of the articles, they must on the contrary be taken as perfectly distinct instruments: this appears from *Sparrow v. Harcastle*, 3 Atk. 798. If it had been argued that, being on the same day, they should be taken as one transaction, they must admit that, if the marriage did not take effect, the husband could not take under the will. But they contend that the intent of the contract was not merely that she should be a *feme sole* after the marriage, but that she should be a *feme sole* before the marriage, in this particular situation, that her will should not be subject to be revoked by the marriage, as it is in every other case. It is necessary to find very express terms in order to cause so remarkable a presumption. The intention was to extend her dominion over her property, but she defeated this by executing the will before the marriage, she certainly meant that Doctor Hibbins should be benefited, on the idea that she was certainly to be married, but she never thought that she was executing her power: this appears from the will itself, for the settlement gives him an estate for life, and the will does the same thing, which would be supposing that she did the same thing twice over. 3d. Supposing however, [*] her intent to be perfectly clear, and that it had been expressed in the agreement that the marriage should not revoke the will, could this prejudice the heir-at-law? The parties could not contract in such a manner as to defeat the operation of law, by which the marriage is a revocation. This follows from the principles laid down in *Hearle v. Greenbank*, they could no more contract that the marriage should not revoke the will, than that an infant should make a will. In *Wright v. Lord Cadogan*, it was settled that, if a *feme covert* dies before actual conveyance, yet her agreement shall be sufficient to bar her heir-at-law, but there must be something equivalent to a settlement. Lord Camden carried this further in *Rippon v. Hardy*, Mich. 1769. (3) But, in those cases, the parties contracted to do what the law would permit

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(3) S. C. *Rippon v. Dowding*, Ambler, 364.

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them to do; but it would be very difficult to support an express contract, that a marriage should not revoke a will.

With respect to the estate Doctor *Hibbins* took, we contend, he took only an estate for life, and nothing arises from the general charge of debts on the estate, for that charge was paramount the will. *Wilkinson v. Marcam*, Cro. Car. 449. *Ibbetson v. Beckwith*, Forrest. 157. *Kingsman v. Kingsman*, 2 Vern. 559.

Mr. Attorney General in reply. — The first objection taken is, that the words are not sufficient to carry an estate in fee to Doctor *Hibbins*, but, wherever real estate is disposed of in the former part of the will, the gift of the residue will carry a fee, although, if no real estate be disposed of, the word *residue* will only refer to things of the same nature with those disposed of before, as was determined by the Lord Keeper, in *Markant v. Twisden*, 1 Eq. Abr. 211.; but in *Ridout v. Payne*, 3 Atk. 486. it was held that rest and residue carried a fee, and the same point was determined in *Jackson v. Hogan*, 7 Bro. Parl. Cas. 417., even in the case of a description of an estate, as lying and being in such a place. The Court of King's Bench have lately, in *Holdfast, ex dem. Cowper v. Marten*, (Durnf. and East, 411.) got over the objection of its being descriptive of the locality only, and have held it to describe the interest the party was to take. (4)

Then as to the next point, in *Wright v. Lord Cadogan*, it was held that articles executory will bind the heir as much as a conveyance executed, which Lord *Hardwicke*, had doubted in *Peacock, [*] v. Monk*, 2 Vesey, 190., where the question was whether a mere agreement would operate as a conveyance, and a case is mentioned in the note, where Lord Chief Justice *Willes* had determined contrary. There is no distinction in this Court, as to the power of a feme covert, whether the estate be a legal or a trust-estate: articles will convey to her a power of disposing of either during her marriage, as if she were sole. If a feme covert have a separate estate, she may, with regard to that, sue alone; this has been held upon a demurrer. The Court takes notice of her as of a feme sole, and, having a disposing mind, she may stipulate that, with respect to such disposition, she shall be as if sole. The next question will be whether the act done in this case be sufficient, and what is the effect of it. It is admitted the husband executed an agreement that she should have a power of disposing. This is as effectual as if she had executed the agreement. He was the party to give the power. I proceed to consider the effect of the agreement, and whether, after the execution of it, there is any rule of law or equity, that will make the marriage a revocation of the will. There is a case, in 7 Mod. 147., of *Taylor v. Raines*, where a feme, by articles before marriage, reserved a power to dispose of a term. Before the marriage, she made a will, by which she gave the term to *B.*, she married and died. It was agreed by the Court that this was not a will to be proved by the executor, but that it amounted to an appointment in equity, and the way has been to grant administration to her nominee. This case was before it was settled that such a will could be proved, though it is now held that administration shall be granted with the will annexed. If a will before marriage had been absolutely revoked by the marriage, the question in that case could not have arisen. But, independent of the case, there is no principle that a will protected by such a power should be revoked by the marriage.

(4) The word "Estate" naturally signifies the interest rather than the subject. See in *Barry v. Edgeworth*, 2 P. W. 524. and the notes; *Ithell v. Beane*, 1 Ves. 215.; *Goodwyn v. Goodwyn*, *ibid.* 226.; *Southby v. Stonehouse*, 2 Ves. 611. 614.; *Pettitwood v. Prescott*, 7 Ves. 541.; *Roe dem. Child v. Wright*, 7 East. 259.

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In the case of a man, the marriage alone is no revocation. It was held in *Christopher v. Christopher*, in *Shepherd v. Shepherd*, in the Pre-rogative Court, H. 10 Geo. 3. and in a late case of *Brady v. Culbitt*, in the King's Bench, (Dougl. 39.) that there must be marriage and birth of a child. (5) Nor is there any better reason why a woman's will should be revoked by marriage alone, especially when she has made an express provision for the case. The reason given by Lord Coke, is because she has no longer a disposing power, but that is confined to the case of her dying under coverture, and does not decide the case of her will reviving [*] after the death of the husband. The ecclesiastical court only holds her incapable during the marriage, but, if she has a power reserved, she may execute that power whether sole or married. The acts of women are different from those of infants, the latter being under a natural inability, but there is no disability in a woman acting under a power to dispose. Her act is considered as a will, for though it has, formerly, been doubted whether it would operate with respect to lands, without being attested by three witnesses, it has of late been held that it must be so attested, and, in *Casson v. Dade*, (ante, vol. i. p. 99.) it was held that, although the power did not require the will to be attested by the witnesses, that it was necessary it should be so, to bring it within the statute. But Mr. Scott argues that, although in the present case, the will was made expressly in contemplation of the marriage; yet it is revoked by it. — The Court cannot be bound to give such a construction to an act reciting the marriage, and contracting that, notwithstanding it, she shall continue, in this respect, a feme sole. This is the stipulation apparent upon the face of the two instruments, and there is nothing in the law to prevent their taking effect.

Lord Chancellor. — I confess I never thought this a very difficult point, but I have heard a great deal of argument upon it: Suppose two years before her marriage, she had made a will, and at the time of the marriage she was possessed of real and personal estate; the first question would be as to the rights of the husband. He would be seized of her real estates, would have a right to sue her actions, and to take her personal estate, and no doubt would arise upon her having, or not having, made a will. Then consider the question, upon the articles, with respect to the husband, he is to part with his rights in favour of her future acts, not on her past will. It must be beyond any intent of his that it should refer back to her former acts. If that point be given up, is this will such an instrument as the articles were intended to give effect to? The will is contrary to the contract. If the parties had never married, the will would have had an immediate effect on some part of her property. The husband must have claimed under the will, not under the power. But the case comes so nearly to that of *Taylor v. Raine*, that it becomes necessary to examine what was there decided. If the marriage is in this case a revocation, I look upon it as such, *eâdem ratione*, that a feoffment would be so, on account of the change of the estate.

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[*] The cross cause stood over, till the original cause should be brought to a hearing.

In the mean time an ejectment was brought by *Richard Hodsdon*, one of the plaintiffs in the original cause, to try the title to the premises in *Surrey*, on three demises, the first on the 10th of *October*, 1768, the day after the death of *Staple* the tenant in tail; the second on the 16th *November*, 1777, soon after the death of *Dr. Hibbins*; the third on the

(5) See the doctrine on this subject much discussed, and well considered in the *Earl of Ilchester's case*, 7 Ves. 348, &c.

12th November, 1787, after the death of the last annuitant *Sarah Dixie*, when the term of 99 years determined. The cause being tried at *Guildford*, before Lord *Loughborough*, the jury found a special verdict, stating the before mentioned facts, and the Court of King's Bench, upon the special verdict being argued there, in *Michaelmas* Term last, gave judgment for the plaintiff upon the last demise. The arguments of counsel and the opinions of the judges, are reported at large by Messrs. *Durnford and East*, vol. 2. p. 684.

The cause stood for judgment, in this Court, on the eleventh of February.

Lord Chancellor. — This bill is filed for an account of the rents and profits of the estates of *Catherine Culver*, come to the hands of *James Hibbins*, or, since his decease, to the hands of the defendants. The case upon which the bill is filed is this. The plaintiffs *Richard and Thomas Hodsdon*, claim, the one as heir general, and, together, as customary heirs of *Catherine Culver*, certain estates comprised in the indenture of 1754, and others not comprised therein, which were settled in strict settlement on the family of *Staple*, and to pay several annuities, the surplus rents and profits to be paid to *Elizabeth Schaffer*, and *Catherine Culver*. The family of *Staple* was existing at the time of the subsequent transactions.

(His Lordship then stated the agreement, previous to the marriage of *Catherine Culver* with Dr. *Hibbins*; the will, the marriage, and death of *Catherine Culver*; the will and death of Dr. *Hibbins*; and the death of *Sarah Dixie*, the last annuitant,) and proceeded to this effect.

The bill prays an account of the rents and profits of all the estates, from the death of *Catherine Culver*, and for the possession of the estates.

[*] There are two questions in the cause, — the first, what is the effect of the articles, purporting a settlement of the whole fund to *Catherine Culver*, and her husband, and the survivor of them, upon her real estates; no actual conveyance having been made, pursuant to the terms of that settlement. — The second, as to the effect of the will. This would have been a mere ejectment bill, if it had stood on any other terms than the commencement of the plaintiff's title depending upon the prior question, what equitable interest Dr. *Hibbins* took by means of the agreement and will. But where the commencement of a legal title depends upon a thing in trust, it is no objection, when a bill is brought here for the recovery of the estate, that it is a legal estate; because it belongs to a court of equity to decide, when that trust determines, and to dispose of the point between the parties. Considering it in this light, the terms of the agreement are these; where *Catherine Culver* recites her property to be real and personal, and agrees that her whole fortune, so described, should belong to the longest liver; by virtue of this agreement, though there was no actual conveyance, the heir will hold that estate, subject to the life interest therein of Dr. *Hibbins*, and consequently, not as present possessor, but as seised of the legal interest in the estate for Dr. *Hibbins*. I think, under these circumstances, the plaintiffs are entitled to the account, only from the time of Dr. *Hibbins*'s death, who being the equitable tenant for life, was entitled to the rents and profits during his life; but when he devised the estate to the *Lloyds*, and they took possession of that estate in consequence of that devise, his devise, for want of a proper title to those estates, was void, and therefore, the *Lloyds* must account as to that estate. The question, in the court of King's Bench, turned upon the effects of *Catherine Culver*'s will. Much argument was used upon that point, but a few positions will dispose of that argument; first, a feme covert may make a will of every thing which she

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is entitled to *in autre droit*, but nothing will pass but by a *pure right of representation* to the former owner, to whom she was executrix; for if the property is reduced into possession, from that moment it becomes the property of the husband, and cannot pass by the will; she may also make a will of chattels real, and *choses in action* not reduced into possession, but if the husband does not assent to the proof of that will, it will be void, and cannot be proved. If he does so consent, either by matter *ex post facto* the death of the wife, or by previous contract, that consent intitles the executor to claim [*] those things which would be the husband's as administrator. In the one case, the executor takes by legal inference, in the other by favour of the agreement made in consideration of the marriage. I think this distinction of the cases explains a variety of the *dicta*, where it is said, that the executor of the wife, when she has a power to make a will takes by her special appointment. With regard to chattels both real and personal, the husband by contract anterior to the marriage resting only in agreement, could authorise her to make a will: but in order to enable her to make a will of real estate, he must part with the legal estate to trustees; for by agreement, whilst resting in agreement only, he cannot bind the heir, but can only bind himself, and the legal estate ought to be conveyed by legal conveyances. This is a will made before the marriage, and as to that point, it is extremely clear that no will made by a feme covert can bind, after the marriage, because it is contrary to the nature of the instrument which must be ambulatory during the life of the testatrix; and as, by marriage, she disables herself from making any other will, the instrument ceases to be of that sort, and must be void. It was argued in an old case, *Forre v. Hambley*, 4 Co. 60., that, if this rule was so, it would apply to cases of insanity, but the judges were of opinion, that it had no such application, as the difference was great between a disability by the act of the party, and by the act of God. It has been argued that there was a contract, here, to enable her to make the will, and that the will, though made antecedent to the marriage, was well made under the power, but it appears that it was not, nor could be so, because the power to make a will *after* marriage, could not be held a power to make a will antecedent to it. If she had died before the marriage, it would have operated not in consequence of the power, but as a will itself: and, therefore, I think the case stands properly upon the marriage articles, and that the plaintiff is not intitled to any thing during the life of the husband, but only since his death; and the account must be from that time, of the rents and profits of the estates of which the wife died possessed.

But his Lordship gave no costs. (5)

(5) It appears, however, on the contrary, that the cross bill was dismissed with costs. R. L.

1789.

SLOCOMBE against GLUBB.

WILLIAM SLOCOMBE, SAMUEL WALKEY, EDWARD BOWCHER, JOHN WARREN GLUBB, the Younger, and THOMAS SLOCOMBE GLUBB, Infants, by the said WILLIAM SLOCOMBE, SAMUEL WALKEY, and EDWARD BOWCHER, their next Friends. - - - Plaintiffs.

JOHN WARREN GLUBB, and JEMIMA his Wife, JOHN GLUBB, SIMON RICHARDS, and ANN his Wife, and JOSEPH BULLEN. Defendants.

Lincoln's Inn
Hall, 24th Feb.
1789.

(Reg. Lib. 1788. B. fol. 679. b.)

BILL filed by the trustees in the marriage settlement of the defendants, *John Warren Glubb*, and *Jemima* his wife, late *Jemima Slocombe*, and *John Warren Glubb*, the younger, and *Thomas Slocombe Glubb*, their children, against the defendant, *John Warren Glubb*, and *Jemima* his wife, and others, praying, *inter al.*, that the several covenants in the said marriage settlement might be performed, and the defendants do all acts necessary for ratifying and confirming the same, and assigning the estates, &c. intended to be thereby conveyed, and particularly, that *John Warren Glubb*, and *Jemima* his wife might be decreed to suffer a recovery of her moiety of the manor of *Wexford*, and that all estates to which the defendants, *John Warren Glubb* and *Jemima* his wife, or either of them in right of the said *Jemima*, had become entitled to since the marriage, particularly the estates devised by the will of *Elizabeth Bobbeth*, might be conveyed according to the covenants in the settlement.

A male infant marries an adult female, who, by settlements, covenants that her estate shall be settled to certain uses; he is bound by her covenant. (1)

The bill stated that by indentures of five parts, dated 30th October, 1783, between the defendant, *Jemima Glubb*, (then *Jemima Slocombe*) of the first part; the defendant, *John Warren Glubb*, of the second part; the defendant, *John Glubb*, father of the defendant, *John Warren Glubb*, of the third part; *Elizabeth Bobbeth*, (grand-mother of the defendant *Jemima*) of the fourth part; and the trustees, *William Slocombe*, *Samuel Walkey*, and *Edward Bowcher*, of the fifth part; reciting the title of the said *Jemima*, as devisee of *Thomas Slocombe*, her brother, deceased, and as one of the co-heiresses, with her sister *Ann Richards*, of certain lands which were subject to mortgages therein [*] mentioned, and further reciting, that a marriage was agreed on between the defendants, *John Warren Glubb* and *Jemima Glubb*, and the birth of the plaintiff, *John Warren Glubb*, the younger, the said defendant, *Jemima*, with the privity of the said defendant, *John Warren Glubb*, conveyed all her freehold messuages in *Bishops Lydeard*, *West Bagborough*, and *Crowcome*, and elsewhere, in the county of *Somerset*, to the trustees, to hold the same (after the solemnization of the marriage) for the term of the natural life of the said defendant, *Jemima*, to receive the rents, &c. and pay the same to the defendant, *Jemima*, or as she should direct notwithstanding her coverture, to her separate use, remainder to the use of defendant *John Warren Glubb* the younger, and his assigns, (in case he should survive his wife) for life, remainder to the same trustees, to preserve contingent remainders, remainder to the use of said male child baptised, *John Warren* (meaning said plaintiff, *John Warren Glubb*, junior,) or of such other child or children of the said marriage, for such estate and interest, and charged with the payment of such sum and sums

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(1) See the case of *Durnford v. Lane*, *antea*, 1 vol. 106., &c. with the Editor's notes and references; *Williams v. Williams*, *antea*, 1 vol. 152: See also *Carruthers v. Carruthers*, *post*, 4 vol. 500, &c.

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of money, unto any or either of such other child or children of said intended marriage, or the said male child, (meaning plaintiff, *John Warren Glubb*, junior,) at such time or times, and by such shares and proportions, and in such manner and form as the said defendant, *Jemima Slocombe*, notwithstanding her intended coverture, and whether covert or sole, by any deed or deeds, or instrument, in writing under her hand and seal, or by her last will and testament should appoint, and, in default thereof, then to the use and behoof of said male child, &c. (meaning plaintiff, *John Warren Glubb*, junior,) or such other child, &c. and charged with such sums, &c. as the defendant *John Warren Glubb*, (surviving his wife) should appoint, and in default thereof, to the plaintiff, *John Warren Glubb*, junior, and also every other the child or children of said intended marriage, lawfully to be begotten, equally between them, share and share alike, as tenants in common, and the heirs of the body and bodies of said male child, &c. (meaning the plaintiff, *John Warren Glubb*, junior,) and, in default of such issue, to such uses as the defendant, *Jemima*, whether covert or sole, by deed or will should appoint, remainder to her in fee. She also assigned leasehold estates to the trustees for the like uses, with a proviso for the payment or transfer of the mortgages upon the premises, and assigned certain personal property, to which she was entitled, to the trustees, to the like uses. The defendants, *John Warren Glubb* and *Jemima Slocombe*, then entered into several covenants to the trustees, that it should be [*] lawful to the trustees to receive the sums of money therein assigned, subject to the trusts, and that they the defendants, *John Warren Glubb* and *Jemima Slocombe*, would not receive or take the same, and that they would do all further acts for assuring the freehold and leasehold premises, and monies, unto the plaintiffs, the trustees, and for giving to them letters of attorney, or powers to receive the said monies, to, for, and upon the uses and trusts therein before declared, by fine and recovery, or otherwise, as should be required; and the defendant *Jemima*, covenanted with the trustees, that she would, by proper conveyances, grant, assign, convey, settle, surrender, and assure unto the trustees, their heirs, executors, administrators, and assigns, all such other the freehold and leasehold premises, and copyhold or customary estates, goods, chattels, &c. whereto the said defendant, *John Warren Glubb*, and *Jemima Slocombe*, or either of them, in her right, should become seised or possessed of, or entitled to, at any time during the said intended coverture, under or by virtue of any settlement, deed, will, gift, bequest, limitation, direction, appointment, purchase, descent, custom, letters of administration, statute of distribution, or otherwise however, immediately after the said defendants, *John Warren Glubb* and *Jemima Slocombe* should so become seised or possessed thereof, or entitled thereto, &c. to the same uses and trusts as therein before were expressed: and reciting that said defendants *Jemima* and *Ann Richards*, her sister, as coparceners, stood seised of the manor or lordship of *Vexford*, com. *Somerset*, (subject to the life estate of *Elizabeth Bobbeth*) as tenants in tail. *Elizabeth Bobbeth*, *John Warren Glubb*, and *Jemima Slocombe*, (with the privy of *John Warren Glubb*,) severally covenanted with the trustees, that in case the marriage took effect, then within one month after said defendant, *John Warren Glubb*, should arrive at the age of twenty-one years, the said *Elizabeth Bobbeth*, and the defendants, *John Warren Glubb* and *Jemima Slocombe*, (in case of the death of *Elizabeth Bobbeth*) should suffer a recovery of the said defendant, *Jemima Slocombe*'s moiety of said manor of *Vexford*, to the use of said *Elizabeth Bobbeth*, for life, with remainder to the same uses as were therein before declared (in which conveyances, certain provisos were to be contained.) And the said *John Glubb*, the father, covenanted with the trustees, that, in case the said marriage should be had, he would, within six months after his

son should attain the age of twenty-one years, pay them 1000*l.* upon the trust, aforesaid, with proviso that if defendant *John Warren Glubb*, who was then an infant under the [*] age of twenty-one years, should, within one calendar month after he should attain his age of twenty-one, or as soon after as could be, ratify and confirm all and singular the clauses, &c. therein contained, that the same might be of such full force as if the said defendant, *John Warren Glubb*, had been of age at the time of the execution thereof, and should join with said *Elizabeth Bobbeth*, and defendant, *Jemima Slocombe*, only (in case of the death of said *Elizabeth Bobbeth*) in suffering a recovery of said *Jemima's* moiety, of the said manor of *Vezford*, and in every respect keep his covenant therein before contained for that purpose, and give such further assurance to the trustees as should be required for settling the premises therein conveyed, then the covenant of *John Glubb* was to be void. And the said *John Glubb* became bound in a bond to the trustees, in a penalty of 2000*l.* for performance of said covenant.

The marriage was afterwards had between the said defendants, *John Warren Glubb* and *Jemima* (the said defendant, *John Warren Glubb*, being, then under the age of twenty-one years,) and *John Warren Glubb* attained his age of twenty-one years on the 19th August, 1785. The plaintiff *Thomas Slocombe Glubb* is the only issue of the marriage.

Elizabeth Bobbeth died 28th December, 1784, and by her will, dated 28th December, 1781, gave all the customary lands, parcel of the manor of *Taunton Dean*, com. *Somerset*, to her grand-daughter, the defendant, *Ann Richards*, then *Ann Slocombe*, and the defendant, *Jemima*, their heirs and assigns, as tenants in common, and not as joint-tenants, and made them executrixes and residuary-legatees of her said will, which will was proved by the defendant *Ann*, the wife of the defendant *Simon Richards*, and the defendant *Jemima*, the wife of *John Warren Glubb*; and the bill further stated, that the defendants *John Warren Glubb* and *Jemima* his wife, have, in the right of the said *Jemima*, become entitled to, and received, divers legacies and sums of money, estates and effects, besides the money, &c. before mentioned, and which ought to be settled according to the covenant in the said indenture of settlement.

The defendants, *John Warren Glubb* and *Jemima* his wife, by their answer admitted the settlement, the death of *Elizabeth Bobbeth*, and that they had become entitled to considerable real and personal property, in right of *Jemima*, since the settlement, but insisted that *John Warren Glubb*, being a minor at the time of executing [*] the settlement, they are not bound thereby, and the trustees are not entitled to have the covenants performed, and, particularly, with respect to the customary estate devised by *Elizabeth Bobbeth*, the defendant, *John Warren Glubb*, insisted, that the same lay within the manor of *Taunton Dean*, and, by the custom of this manor, the husband of any woman tenant of the manor, making the usual entries, and paying the customary fine, becomes absolutely seised of the inheritance; and that he had made the proper entries, and paid the fine, and had contracted for the sale thereof, with *Joseph Bullen*, a defendant in the cause, and had received 10*l.* of him, and was entitled to receive the remainder of the purchase-money, which, he insisted, ought not to be paid to the trustees, to the uses of the settlement.

The question before the Court was, whether the defendant, *John Warren Glubb*, being an infant at the time of the execution of the indentures, was bound by them.

Mr. *Solicitor General*, and Mr. *Mitford*, for the plaintiffs. — As far as *John Warren Glubb* claims any thing under this settlement, he is bound to carry the same into execution. If he refuses so to do, he cannot take any thing under the limitation, the foundation of the claim being his

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agreement, if he will not perform the contract, it will be a settlement without him. Admitting the doctrine of election to apply to a deed, what he would take (a life-estate) the wife and children will take as a compensation for what they lose by his non-performance of his contract. But we contend that he is absolutely bound. All the estate was the property of the wife, who was of age, and contracted for a valuable consideration; the husband is, therefore, bound when of age, to perform her contract. In *Durnford v. Lane*, (*ante*, vol. i. p. 106.) though the wife was under age at the time of the settlement, the husband, who was adult, was held bound in conscience not to suffer her to break her covenant.—Contracts for valuable consideration are very extensive in their application. This contract extends to all the children of the marriage, *Mrs. Bobbeth and Jemima Slocombe* are bound by their covenant. If *Mrs. Bobbeth* had taken a second husband, he would have been bound by her contract, and would have been liable in an action brought by the trustees, much more *John Warren Glubb*, who is a party. There are many cases where an infant is bound by a contract he has entered into: as, in all cases where he has advantage by means of the contract, as, if the eldest son promise his father to [*] give the younger son 100*l.* if the father will desist from making a settlement, which he intended, on the younger son, by which means, the father desists from the settlement, though the eldest son was an infant, he shall be compelled to pay the 100*l.* 2 Com. Dig. tit. Chancery. 3 R. 5. So in *Scott v. Houghton*, 2 Vern. 560. *Kingston v. Elliott*, 2 Bulst. 69. For this reason, it was held in *Hervey v. Ashley*, 3 Atk. 607., that the female infant was bound by the settlement to the extent of her personal estate, because the settlement was for her benefit, as otherwise the whole personal estate would go to the husband. And in *Drury v. Drury* (2), (*Earl of Bucks v. Drury*, 5 Bro. Parl. Cas. 570.) the settlement was held to bind both the personal and real estate. It would be extraordinary if the law should hold the party of proper age to contract marriage, not of sufficient age to enter the contract in the settlement. Therefore with respect to a female infant, it has been held binding, *Cannel v. Buckle*, 2 Wms. 242. *Lucy v. Moor*, 3 Brown. P. C. 514. *Jordan v. Sharpe*, 2 Eq. Ca. Abr. 101. But the case of an infant male marrying an adult feme, is stronger than those, and, in the present case, he takes a better interest by the settlement than he would by law, for, though, in case he survived her, he might be entitled to the estate for life by the courtesy, he takes an *express* estate for life by the settlement.

Mr. Mansfield, for the defendants.—The defendants rest their case on the ground of the infancy of the husband, and I deny that the Court can judge for the infant, whether the contract is beneficial for him, *in toto*. The infant, himself, must be the sole judge of that, when he is of a competent age. It seems a late period, in the law of *England*, to be considering, as a general point, whether an infant can be bound by a contract made on marriage, and no case has been yet determined to this extent. *Drury v. Drury* (2), does, certainly, go so far as to decide that an infant may, by a contract on marriage, bar herself of a right to be acquired by that marriage, namely, that of dower, but that case does not determine that an infant female could bind her own property; and, as to a male infant, there is not a *dictum*, even to that effect. The case in *Comyns's Digest*, only shows that a gift on condition shall not take effect, unless the condition be complied with, *Scott v. Houghton* in 2 Vern. is no more; *Cannel v. Buckle*, contains no decision on the point, it is

(2) Vide 8. C. 2 Eden's Ca. Lord North, 39. &c. with the notes. 3 Bro. P. C. 492. *post* edition. Et per Lord Eldon C. 18 Ves. 276, 277. with the Editor's note, *ante*. 1 vol. 106.

merely a case put in argument; *Lucy v. Moore*, 3 Brown's Parl. Ca. is a mere argument, and no [*] decision; nor is there any to be found in any of the cases cited. *Drury v. Drury*, turned on the true construction of the statute of jointures, which has made no exception of infants; or, rather, it turned upon an analogy to that statute, which was thought proper to be adopted. If there had been any such law existing, as that now contended for by the plaintiffs, it is surprising it should not be found among the law relating to guardians, and yet no such distinction is to be found between marriage contracts and contracts of any other nature. It is then said, on the part of the plaintiffs, that the husband must be bound to the extent of the benefit taken by him under the settlement; as to the leasehold and the money, he would have them absolutely, if no settlement had existed, and the only difference is, that he takes the freehold for life, whether tenant by the courtesy or not.

Mr. *Solicitor General*, in reply, — observed, that the husband certainly had in fact received a benefit from this settlement, for the grandmother who was a party to it, had evidently left a moiety of her real and personal property to her granddaughter, the wife, upon a full expectation that it would be settled. He mentioned 9 Mod. 35. and 13 Viner, 537.

Lord *Chancellor*.—If a woman before marriage, conveys her property, and agrees to settle her general expectations, when they shall fall in, and this be done without any fraud upon the intended husband, such an agreement must be executed, and the husband, when of age, must answer her contract. I think, therefore, that in this case, *it is not necessary to discuss the other question, how far the infant husband could be bound by his own contract: for I go upon the covenant of the wife, who was adult.* And the husband's covenant operates no more than to show his concurrence, and to take away every imputation of fraud from the transaction.

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Stocome
against
Glenn.
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[*] *HOSKINS against FEATHERSTONE.*

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(Reg. Lib. 1788. A. fol. 193. b.)

Lincoln's Inn
Hall, Feb. 28.

BILL by the patroness, the ordinary, bishop of the diocese and churchwardens (2) of the living of *Oxted*, against the widow of the late incumbent.

The bill stated the plaintiff's right of patronage and presentation of the rectory, vacant by the death of *Ulrick Featherstone*, otherwise *Featherstonehaugh*, the late rector, that the rectory consists of a dwelling-house, and glebe lands, with trees for ornament and use, and, that since the death of her late husband, the defendant had committed, and suffered, great waste in the premises, and threatened to commit further waste, and prayed an injunction to restrain her from cutting timber, grubbing up the under-woods, plowing the meadow lands, pulling down buildings, or committing, or suffering, other waste.

At the last Seal, (the 23d inst.) Mr. *Selwyn*, moved for the usual injunction; which Lord *Chancellor* refused, holding that the fee-simple was in abeyance, and that, consequently, the plaintiff had no title to support the injunction.

Injunction
granted to stay
waste, against
the widow of a
rector, at the
suit of the pa-
troness during
vacancy. (1)

(1) See 1 Bos. & Pull. Rep. C. P. 115. in note on *Bradley v. Strachey*, which is S. P.

(2) The bill appears in R. L. as merely on the part of the patroness; but a contemporary note of Lord *Colchester* agrees with the above statement, with the additional observation, that the churchwardens were the sequestrators, although not so stated in the bill.

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Mr. *Selwyn* this day repeated his motion, insisting that the right of patronage was a sufficient ground for that purpose. He observed that the other parties, namely, the diocesan, ordinary, and church wardens, (who were sequestrators) were made co-plaintiffs (3); but that, independent of any interest they might have jointly, (for the sequestrators had not, according to *Bunbury*, 64. any interest,) the plaintiff, as patroness, had a sufficient right, and Lord *Hardwicke*, had in the case of *Bradley v. Strachy*, (4) *Barnard*, 399. 2 Atk. 217. (*Strachy v. Francis*,) granted the like injunction upon a bill filed by the patron. He also cited 2 Roll. Abr. 813., to show that a writ of prohibition would lie. [*Knight v. Mosely*, Ambl. 176. S. P. with *Bradley v. Strachy* and *Rd. Liford's case*, 11 Rep. 46, b. 49, b. and *Hoburt*, 36. pl. 41.]

The application was made upon the usual affidavit.

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Mr. *Finch* opposed the motion, contending that the right of patronage did not convey any title whatsoever to the patron, in respect of the parsonage, or its appendages, as glebe lands, &c. [*] That, in this Court, where a party applied for an injunction, it was absolutely, necessary, previously, to establish a title to the premises in question; that the patron could not show such a title, having nothing more than a right of patronage, the fee-simple being in abeyance during the vacancy, according to *Littleton's position*: 1 Inst. 342. b. That no writ could be found in *Fitz. Nat. Br.* or any of the old law books, which gave a remedy against waste during the vacancy; and, as to its being alleged that there is no remedy but by coming into a court of equity, it might be answered, that as soon as the vacancy was supplied, the incumbent, after institution and induction, became completely entitled to the freehold of the church and its appendages, and might, either in the spiritual court, by suing for dilapidations in respect of the spoliation of the parsonage, or by special action upon the case as to waste on the glebe lands, recover damages against the legal representative: for he admitted that in this case the widow had no title. — As to the authorities, they were founded upon the idea of a writ of prohibition against the rector, and upon the statute, *ne rector prosternat arbores in cæmeterio*, and Lord *Hardwicke*, with much reluctance, granted relief in analogy to those writs: but, in case of a vacancy, no writ whatever could lie, the fee-simple being in abeyance. — The other plaintiffs set up no right by the bill. (5)

Lord *Chancellor* declined giving any opinion till *Monday*, when he granted the injunction.

(3) See note (2) in preceding page.

(4) The report of this case in *Barnard* is a very accurate one, and the decision is expressly in point. *Vide* 1 Bos. & Puller, 115. note.

(5) No other parties appear as plaintiffs in R. L.; but this must be from some mistake in the entering clerk.

1789.

ATTORNEY GENERAL, at the Relation of the Chaplains of the New
Church at TIVERTON, COM. DEVON. - - Plaintiffs.

BAYLEY and Others. - - - Defendants.

(Reg. Lib. 1788. A. fol. 214.)

Lincoln's Inn
Hall, 2d March.

THE information stated, that *John Tristram*, seised in fee of certain estates called *Cokeswell* and *Howsfield*, being parts of a tenement called *Ashley*, and possessed of other estates called *Middlehill*, and the *Bushments*, being other parts of the said tenement called *Ashley*, for a long term of years, made his will, dated 15th February, 1724, and, after charging the same [*] with an annuity to *Elizabeth Tolcher*, wife of *Samuel Tolcher*, both since deceased, for her life, gave and devised to trustees, their heirs and assigns for ever, so much of the said estates whereof he was seised in fee, and gave and bequeathed to them, their executors, &c. so much thereof, wherein he was possessed of a term of years, and also bequeathed to them, their executors, &c. all his other goods and chattels whatsoever, and made them executors, declaring the trust to be, that all such part of the tenement called *Ashley*, called *Cokeswell*, and *Howsfield*, should be enjoyed by his brother *William Tristram*, during the term of ninety-nine years, if he should so long live, remainder to the first son of the said *William Tristram*, and the heirs of the body of such first son, remainder to the second, third, fourth, &c. and all and every other the sons of the said *William Tristram*, severally, successively, and respectively, one after another in tail male, remainder to the daughter or daughters of the said *William Tristram*, and, in default of such issue, then by *John Tolcher* and *Tristram Tolcher*, and the respective heirs of their bodies lawfully issuing, and, in default of such issue, then to be applied to the benefit of the new church and charity school of *Tiverton* aforesaid; and as concerning those parts called *Middlehill* and the *Bushments*, whereof he was possessed of a long term of years, his will was, that his brother *William Tristram* should have the use, &c. thereof, for so many years of the term as should expire in his life-time; and, after his decease, his will was, that his executors should permit all and every the child and children of said *William Tristram*, their executors, &c. respectively, to hold and enjoy the same for his and their proper use during the remainder of said term, in such manner as the said *William Tristram* should, by his will or deed in writing, &c. direct; and for want of such appointment, then equally share and share alike, without any benefit of survivorship, but if it should happen that the said *William Tristram* should die without issue, in the life-time of the said *John Tolcher* and *Tristram Tolcher*, or either of them, then his will was, that the said *John Tolcher* and *Tristram Tolcher*, if they both survived the said *William Tristram*, dying without issue as aforesaid, should equally have the benefit and advantage thereof for so many years of the term as should expire in the life-time of the said *John Tolcher* and *Tristram Tolcher*, and if only one of them should happen to survive the said *William Tristram*, dying without issue, as aforesaid, or if both should happen to survive the said *William Tristram* so dying, without issue as aforesaid, and one of them should happen [*] to die before the other of them, leaving issue behind him, then the testator's will was, that such survivor should have but one half of the benefit and profits of the said parcel and parcels of

The words "if
" he shall hap-
" pen to die
" without
" issue" may be
so controlled by
the context of
a will, as to
mean children,
and the remain-
der over will,
in that case,
not be too
remote. (1)

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(1) See *Knight v. Ellis*, postea, 570.

1789.

ATTORNEY
GENERAL
against
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Ashley, called *Middlehill*, and the *Bushments*, and the other half part should go to be divided among all and every the child and children of him so dying, share and share alike, during so many years of the term as should expire in the life-time of the survivor of them the said *John Tolcher* and *Tristram Tolcher*, and, if he so dying, should leave no issue behind him, the testator's will was, that the benefit thereof should devolve upon the survivor, for so many years of the term as should expire in the life-time of such survivor, and after the decease of the survivor of them the said *John Tolcher* and *Tristram Tolcher*, (in case they or the survivor of them should survive the said *William Tristram*, dying without issue as aforesaid) the testator's will was, that all and every the child and children of the said *John Tolcher* and *Tristram Tolcher*, (though one of them might or should happen to die before the said *William Tristram*, dying without issue as aforesaid) and the executors, administrators, and assigns of such child and children should have the said *Middlehill* and the *Bushments*, share and share alike, for and during the remainder of the term, and in default of such issue, or if the said *William Tristram* should happen to survive, and die without issue, after the death of said *John Tolcher* and *Tristram Tolcher*, then the testator's will was, that *Middlehill* and the *Bushments* should go to, and be applied towards the benefit of *Tiverton* new church and charity school as aforesaid. *John Tristram* died, 4th May, 1728, the executors proved the will, and *William Tristram* entered into possession of *Middlehill* and the *Bushments*, and continued so till his death, 11th Nov. 1777, when he died unmarried, and without issue. *John Tolcher* and *Tristram Tolcher* both died in the life-time of *William Tristram*, *Tristram Tolcher* without issue, and *John Tolcher* leaving issue one daughter, *Mary*, late the wife of defendant *Bayley*. — The information stated, that the said *William Tristram*, having died without issue as aforesaid, the premises, on his death, became subject to the charitable bequest, for the benefit of *Tiverton* church and school. It further stated, that *William Tristram*, by his will, 18th January, 1769, gave the premises called *Middlehill* and the *Bushments* to the defendant *Govett*, but that the defendant *Bayley*, pretending that his wife *Mary* had become entitled to the premises under the will of *John Tristram*, as being the only child of *John Tolcher*, had got into possession, [*] the information therefore prayed that [the charitable purposes of the said testator, with respect to the tenements, called *Middlehill* and the *Bushments*, might be carried into execution, and that the defendant might account for the rents, and] deliver up the premises for the benefit of the charity.

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The cause came on to be heard at the Rolls, 30th November, 1785, when his Honor, the late Master of the Rolls, was of opinion, upon the construction of the will, that the interest of the testator was not well disposed of, thereby, in favour of the charity, and dismissed the information with costs.

From this decree the charity appealed, and the appeal came on to be heard 7th December last.

Mr. Solicitor General and Mr. Mitford, for the appellants. — This is a claim, by the charity, as becoming entitled upon the death of *William Tristram* without issue, surviving the *Tolchers*, against two defendants, the one the devisee of *William Tristram*; the other the personal representative of Mrs. *Bayley*, who was the daughter of one of the *Tolchers*.

His Honor's doubt was, whether *William Tristram* took an absolute estate, and whether the remainder over to the *Tolchers*, was not too remote. His opinion was, that it was impossible they should take. *William* took only a life estate, and the remainder over is at his death, if he should then leave no issue living, (i. e. children,) not upon an indefinite failure of issue. The first limitation is to *William*, to take for so many

many years as he should live, then to his *child or children*, in such manner as he should appoint. This shows he was to take for life only, and that a child or children only were to take: *William Tristram* could not appoint to a grandson, or have given any interest to the issue of a child, much less is it an indefinite failure of issue, for he might have died leaving issue, though not issue within the terms of the will: but if *William* should die without issue, (that must be issue as aforesaid,) in the life of the *Tolchers*, then the lease was given to them for so many years as should expire in their life-time, which, from what precedes it, must mean, if *William* should die without having had issue, or leaving no issue living at his death: — Then, with respect to the *Tolchers*, the child or children of *John* or *Tristram Tolcher* were, expressly, to take at the death of *John* or *Tristram*. The word *issue* is explained by *child or children*. So that the testator's intention was, that the *Tolchers* should take only life estates, and their children should [*] take *eo nomine*, as *children*: in default of such issue, or if *William* should survive, and die without issue, then to be applied to the uses of the charity. The question is, whether the words *such issue*, and *issue* in this passage must not receive the same construction as in the former, namely, *children*. The testator has given upon a double contingency. 1st, If *William* dies without *children*, living the *Tolchers*, then he gives to the *Tolchers*: if *William* survives the *Tolchers*, and dies without *children*, to whom the testator had given *eo nomine* as *children*; then he gives to the charity. Both these events having happened, the gift to the charity is good. If this construction be right, and the word *issue* is to be construed *children*, none of the remainders are too remote. *William* taking only for life, his children took interests which were vested at their birth, subject to appointment, but not to be defeated, the testator meant if *William* had a *child*, that child should take absolutely. Then, with respect to the remainder to the charity, if neither of the *Tolchers* should survive, the leasehold was to go to the charity. This is not like the case of dying without issue, because it is controlled by the words *such issue*. In the general case of a gift to *A.*, and, if he shall die without issue, then to *B.*, it is an indefinite dying without issue, but not where it has relation, as it has here, to the former disposition. So, if an estate be given to *A.*, and the heirs male of his body, and if he die without issue, &c. here the word *issue*, will be contracted to *issue male*. If we consider the vulgar sense of dying without issue, it means without issue living at the death of the party to whom first given, or, perhaps, generally means a dying without having had issue, not as it is taken in a formedon, where, whenever the issue fails, the party is said to be dead without issue, for this sense is never given in the case of personal estate. *Forth v. Chapman*, 1 Wms. 663. Here, the testator had no idea of a general failure of issue, he meant the point of time at which the remainder was to take effect was to be at the death of *William*, and the gift to the charity being a mere substitution to the other gift, the same moment must be the time when the remainder to the charity was to take effect.

Mr. Mansfield, in support of the decree. — The limitation over, in the present case, is too remote; a gift to *A.*, and, if he die without issue to *B.*, the remainder must be too remote, unless there are words in the will to control the general sense of the words, *if he shall die without issue*. There is nothing in this [*] will to require that the words should have a different sense. Here the testator gives to his brother *William* for life, and if he should die without issue, then to the *Tolchers* equally, if he survives the *Tolchers*, and dies without issue, then it is to go to the charity. I believe every man who, in making his will, uses these words, means dying without leaving issue at the time of his death, but that is not sufficient, if there is nothing to control the general words. In *Forth v. Chapman*,

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v. *Chapman*, the words were *leave* no issue, which of necessity was controlled to the death of the party, but there is nothing here to control the meaning of the word *issue* to *children*.

Another question may arise with respect to the claim of *Mrs. Bayley*; reading grammatically, the claim of the children of the *Tolchers*, depends on an event which has not happened, namely, *William's* dying in the life of the *Tolchers*: but there is a clear intention that the charity shall not take whilst there are children of the *Tolchers*.

This appeal stood for judgment, *March 2d*.

Lord Chancellor.—If a man gives an estate in general to *A.*, for life, and adds “but if he dies without issue, I then give it to *B.* *B.*, has no immediate gift, but only a *contingent interest upon A's dying without issue*, and it would counteract the intention of the testator, if *B.* took it immediately upon the death of *A.*, therefore, *ex necessitate rei*, the true argument in both *real and chattel interests*, is that, in fact, these words operate to an enlargement of the estate *for life*, for, otherwise, the issue of *A.*, would not take at all, and *B.* would take the whole, and therefore, the necessary implication must take effect, (namely) that *A.* should have an estate, which must devolve upon his issue. Upon that ground, the Court has extended the estate beyond an estate for life (2), and in a freehold interest has deemed it an estate-tail, and in chattel interests an absolute property (3): but that arises from the necessity of the construction.

In this case, after an express estate for life to *A.*, (so that he must take as a purchaser,) the testator proceeds, (stating the limitations of the will as before.) Here no such necessity arises from the words “dying without issue,” as the words are referable to dying without issue *so provided* for. It is so well settled that no dispute could arise. If the *Tolchers* had no interest, that they [*] could take, it would go to the charity. In the events which have happened, this case results to the ordinary one I have stated, and the charity must have a decree.

The decree at the Rolls reversed.

(2) See also in *Knight v. Ellis*, *postea*, 578., and Mr. *Sanders's* note to *Hodgson v. Bussey*, 2 Atk. 89.

(3) See *Lyon v. Mitchell*, 1 Madd. Rep. 467, &c., and *Britton v. Twining*, 3 Merivale, 176, &c.

[S. C. 2 Dick.
664.]
14th, 25th,
Jan.—8th Feb.
—[8th Nov.]
1786, and 2d
March, 1789.

WHITCHURCH against BEVIS.

(Reg. Lib. 1788. B. fol. 427.)

Plea of the statute of frauds to a bill for execution of a parol agreement, for sale of lands, alleging certain acts as a part-performance. The plea averring that there was no agreement in writing, and supported by an answer insisting that such alleged acts did not amount to part-performance, *allowed, on re-argument after much consideration.* (1)

PLEA of the statute of frauds, to a bill for specific performance of an agreement to sell an house for an annuity. The bill stated the following facts, to show a part-performance, the agreement not having been reduced into writing; particularly, that the attorney concerned had received instructions, from both the plaintiff and defendant, to pre-

part

(1) This plea had been overruled on the former occasion, after several days' argument, and was now allowed after the most mature consideration. The result, on this latter decision, is held to be clearly right; see the doctrine and the cases in *Beamer's Elem. Pleas*, from page 171.; and as the acts stated in the bill were held not to amount to a part-performance, there was no necessity for any averment on that head in the plea as well as by the answer. It seems, however, that if acts of part-performance are charged *generally*

pare the conveyances, and made a minute of the terms upon which the sale was to proceed, but, from the confidence the parties had in each other, it was thought unnecessary to put the agreement in writing. The attorney's minute was nearly this, "Mr. *Bevis* agrees to convey the house, (describing it,) in consideration of a rent of 40*l. per ann.*: Mr. *Whitchurch* to take the stock at a fair appraisement," that the parties agreed to deliver the title deeds to *Chubb*, the attorney, to prepare the deeds, and then to deliver them to one *Maynard*, as a trustee for the purpose of securing the annuity. The bill further stated, as a part-performance, that the parties fixed upon a person, as appraiser, to value the stock, and that the plaintiff had, with the privity and consent of the defendant, entered into articles with a third person (*Webb*) to grant him a lease of the premises for seven years, as soon as he should be in possession of the lease from the defendant. To this bill the defendant pleaded the statute of frauds, both as to the discovery (2) and relief (3), but did not aver in his plea that there was no parol agreement. And his answer only went to the part-performance, and did not deny the parol agreement.

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This plea came on first to be argued, 14th *January*, 1786.

Mr. *Ambler* and Mr. *Ainge*, in support of the plea. — By the statute of frauds all agreements are to be in writing, and signed by the party or his agent. If the minute produced in court had been taken down from the instruction of the parties, still it would not be sufficient for the purpose, as it is not signed by [*] the parties, or any person authorised by them. *Hawkins v. Holmes*, 1 Wms. 770. *Bawdes v. Amhurst*, Pre. Ch. 402. As to the part-performance, the defendant denies the consent to the agreement, to underlet — and, at most, what is stated, only is, that the plaintiff should underlet if the purchase should be completed.

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Mr. *Madocks*, for the plaintiff. — The bill proceeds upon a part-performance of the articles. The agreement is, that the annuity should commence on the 25th of *March*, and the possession should then be delivered; that the deed should be delivered to the attorney to prepare the conveyances. The bill states, as a part-performance, the delivery of the title deeds, according to the agreement, and that a person was employed to appraise the goods, and these facts, the answer not being replied to, must be taken as true.

Lord *Chancellor*. — These facts only prove the existence of the agreement. A plea admits the bill to have equity, which a demurrer does not.

Mr. *Madocks*. — The plea in this case cannot be good, for, if it was replied to, it would not put an end to the cause. The plea of *no written agreement* to a bill, only stating a *parol* agreement is not *ad idem*, and cannot end the cause.

Lord *Chancellor*. — The difference between a plea and a demurrer, as to this subject, is, that if they have not stated facts in their bill to main-

tainly in a bill there must be an averment in general in the plea to the contrary as well as a general denial by answer, agreeably to the doctrine stated in the 2d edition of Lord *Redesdale's* Treat. on Pleading, 212, 214. notwithstanding it is doubted and the sentence suppressed in the 3d edition. See Mr. *Beames's* Elem. Pleas, 172, 173, &c. *et ibid.* from p. 27. to 32., and the Editor's note to *Whitbread v. Brockhurst*, ante, 1 vol. 404. And see the general doctrine yet admitted to exist in the 3d edition of Lord *Redesdale's* Treatise, p. 241. and per Lord *Eldon* C., *Morison v. Turnour*, 18 Ves. 182.

(2) "As to any agreement not reduced into writing, and signed by the defendant, or "some person thereunto by him lawfully authorised." R. L.

(3) Insisting that neither he the defendant, nor any person by him lawfully authorised, did ever sign any contract or agreement, in writing, for making or executing any sale or conveyance to the plaintiff of the said messuage or tenement, or any part thereof, or any interest therein, or to any such effect, or to any memorandum or note in writing of any such agreement. R. L.

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tain their part-performance, it should be a demurrer, although the practice has been to plead it. (4)

Mr. Ambler. — The course has been to plead the statute, and to deny the facts charged as a part-performance.

Lord Chancellor. — When a court of equity said, that, if a parol agreement came out, there should be a specific performance, they said it was matter of honesty to carry it into execution. If I say that, upon a parol agreement appearing it shall be performed, I must say, I shall compel the discovery whether there was a parol agreement or not.

[*] Mr. Ambler. — Upon the face of this case, I deny that there is a part-performance.

Lord Chancellor. — If it proceeds on the ground of part-performance, the whole cause must turn upon it, and if the plea should be allowed, they must take issue upon it, or else admit the facts.

Mr. Ambler. — The common case of part performance, is the laying out of money on the premises (5): the merely delivering the deeds is no part-performance; no more is the appointing of an appraiser. This was held insufficient in the case of *Whitbread v. Wainwright*, (*ante*, vol. i. p. 404.) It must be something done as owner of the estate, and which the party would not have done had he not considered himself in that light. (6)

Lord Chancellor. — I wish the case to stand over, in order that it may be argued upon the form of the plea itself. It is argued that, if there has been an agreement which has been partly carried into execution, there must be a decree for a specific performance. — I want to go into the question, as to the supporting of a plea by the answer. The rule as to this matter seems very much confined. If the Court is of opinion, that if part of the agreement is performed, that will take it out of the statute. I cannot quite understand the rule. If the plea of the statute is a total bar to the relief, and only a partial bar to the discovery, it seems to be anomalous. (7) If the Court is right in the rule, that if any agreement comes out it must be performed, I see no reason why there should not be a discovery, for the discovery is only an incident to the natural justice of performing the unwritten agreement.

The plea stood over, but came on again the 25th January, [1786.]

Mr. Ambler, in support of the plea. — This case now comes on again upon the plea, and the state of facts in support of it. Where a plea is to part of a bill, it takes up that part and pleads in bar to it, but if there are further facts stated in the bill, which would give the plaintiff a right to a relief, there must also be an answer. In the case of pleading a purchase for valuable consideration, you must by answer deny notice, because, though if there were nothing more in the case, the purchase would be a [*] good plea; yet there is something behind, because notice would affect the defendant's conscience; therefore he must deny it. — So, in the case of a trust, if a defendant pleads that he is a pur-

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(4) As courts of justice ought to take notice of the public statute law of the realm, it should seem, that it would be as competent for the Court to decide such a case as demurrer, as well as on a plea. See fol. 568. Cases on the Ship Registry Statute have been determined on demurrer. *Battersby v. Smyth*, 3 Madd. Rep. 110.

(5) See *contra*, 1 Scho. & Lef. 40.

(6) Lord Redesdale C. seems to have placed the doctrine on just and clear ground, when he held, "that nothing is to be considered as a part-performance, which does not put the party into such a situation, as that it is a fraud upon him if the agreement be not performed." See in *Climon v. Cooke*, 1 Scho. & Lefroy, 41.

(7) The whole confusion in these instances seems to have arisen from the double pleading first adopted in bills, instead of introducing traverses by special replications, as before; so that a defendant appears driven to the necessity of following the example, or making his defence by plea incomplete. See Mitf. Treat. 199. note, (3 ed.) & Journ. Elem. Pleas, 4. 175, &c.

chaser for a valuable consideration, he must deny the trust. Suppose a bill stated a mortgage, the defendant may plead that he is a purchaser for a valuable consideration; but, he must deny the trust. So, in another case, where the bill suggests fraud, if the defendant, in this case, pleads purchase for valuable consideration, if the fraud be only charged generally, he may deny it so, but, if a particular fraud be alleged, it must be particularly denied. *Price v. Price*, 1 Vern. 185. The reason is, the plea or answer must do away every part of the bill, upon which the plaintiff could have a remedy. — This is a plea to the discovery, as well as to the relief. The defendant is not, in this case, bound to discover; for, if you discover the agreement, it is, then, out of the statute, *Wanley v. Sawbridge*, Exch. East. 4 Geo. 2. that was a plea of the statute, by an executor, to a bill for a discovery of a parol agreement. The Lord Chief Baron objected that it could not be pleaded to the discovery, but only to the relief. It was held it could not be pleaded to the part-performance. If, in our answer, we had admitted our consent to the lease to *Webb*, that would prevent the plea from applying to the discovery. In this case, the bill states an agreement within the statute. If, upon issue joined upon the plea, the fact was found against the plea, the party must be examined upon interrogatories.

Lord Chancellor. — Suppose this plea to be allowed to the remedy, with the exception of the part-performance, then you would have a plea allowed because the agreement was not in writing, to a bill which does not state an agreement in writing, and which would put the equity on a different ground.

Mr. Ambler. — *Gunter v. Halsey* (8). — *Foxcroft v. Lister*, 2 Vern. 456. show, that the acts done here, are not sufficient to constitute a part performance. In *Brownsword v. Edwards*, 2 Vesey, 243., it is laid down that, if the plea should turn out false in fact, the party must be examined upon interrogatories, and then the plaintiff would have the full benefit of the discovery. In *Hawkins v. Holmes*, 1 Wms. 770., the alterations in the deed in the hand-writing of the defendant was not held to amount to signing. — What is the appointing a man to value the goods? Is that a part [*] performance? In *Foxcroft v. Lister*, much more had been done. Here nothing is done in consequence. In *Whitbread v. Wainwright*, your Lordship laid all these facts of part-performance out of the case.

Lord Chancellor. — If the bill has not stated a part-performance, it is an objection against the bill on an agreement not in writing. If the statute meant that the agreement not being in writing should destroy the remedy, the part-performance would be immaterial. But the case here is, that of an agreement stated, and confessed not to be in writing.

Mr. Madocks. — As to the cases where the agreement is not in writing, but acknowledged, and the court has decreed upon them, Baron Eyre, in a case in the exchequer lately (*Eyre v. Ivison*, Trin. 1785,) said, he would examine whether they were not cases where the statute had not been insisted upon; for he doubted whether a performance could be decreed, although the agreement was confessed, if it was not in (9) writing. That was a case of part-performance, and, there being a plea of the statute, the plaintiff insisted, that though the part-performance should

(8) Ambler, 586.

(9) Lord Eldon C. seems to have set this point at rest, agreeably to Mr. Baron Eyre's impression, and that of Lord Thurlow's stated afterwards in this case; and it appears now settled, that specific performance of a parol agreement will not be decreed, although such an agreement be admitted by the defendant, if he insist upon the statute of frauds; and that, if admitting it, he says nothing about the statute in his answer, &c. he shall be taken to renounce its benefit. See in *Cook v. Jackson*, 6 Ves. 37, 39, &c. *Sparrier v. Lady Fitzgerald*, *ibid.* 548, 555, 556. Beam. Elem. Pleas, p. 178. and cases there cited.

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not be proved, the defendant would be bound by the confession of the agreement. Baron *Eyre* over-ruled the plea, and said that he thought the cases would not turn out to be, that the court could decree a performance on the confession of the defendant.

The case stood over, but came on again the 8th of *February*.

Mr. *Ambler* and Mr. *Ainge* again argued in support of the plea.

The plea is in the nature of a plea of an award, or of the statute of limitations. — A plea of the statute of limitations without any particular fact stated in the bill, to take it out of the statute would go to the relief, and to the discovery; so does this plea, if the bill states no particular fact of part performance.

Lord *Chancellor*. — You assume it to be clear that, in the usual case, the pleas without an answer would have been good. How do you prove that?

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[*] Mr. *Ainge*. — *Hollis v. Whiting*, 1 Vern. 151., the Court was of opinion, that, without particular circumstances, the plea was good, but if the bill had stated that it was part of the agreement, that it should be reduced into writing, it would alter the case and might require an answer.

Lord *Chancellor*. — *Hollis v. Whiting* was never decided, and Lord *Aylesford's* case, 2 Stra. 783., is directly contrary. (10)

Mr. *Ainge*. — *Cottingham v. Fletcher*, 2 Atkyns, 155., shows that if the plea stood single it would have been good. So Pre. Ch. 533. *Croyston v. Banes*, Pre. Ch. 208. *Symondson v. Tweed*, Pre. Ch. 374., and Baron *Eyre* in the case of *Stewart v. Careless*, Exchequer, 10th April, 1785, thought that if the defendant by his answer insisted upon the statute of frauds, a specific performance could not be decreed, although he confessed the agreement. (11) The cases out of the statute are enumerated. *Attorney General v. Day*, 1 Vesey, 221. *Potter v. Potter*, 1 Vesey, 441.

Mr. *Madocks* for the plaintiff. — A demurrer admits the premises, but denies the conclusion drawn from them. A plea introduces some new facts, which destroys the conclusion. In a plea you may select any fact in the case, and plead to it, answering the rest, and though you cannot plead doubly to the same part of the bill, you may to the distinct parts of the bill so as to make out a proper defence. — It is necessary to distinguish what pleas go to the relief, and what to the discovery. In a plea to the relief, it must be of something which will put an end to the plaintiff's case. This is a plea to the relief: now the Court will always enforce a performance of the agreement, where there is a part performance, or the agreement is signed by the party to be bound by it. Indeed it used formerly to be held, that the agreement must be signed by both parties; but in a case of *Cotton v. Lee*, before the Lords Commissioners, in the year 1770, it was held sufficient, if the party to be charged had signed it. And the same has been determined in the Exchequer. Hence exceptions have arisen, taking some cases out of the statute, as this, where the party to be charged has signed it. Another is, where the agreement appears by the confession of the party, as in *Croyston v. Banes*. Another, where it is part of the agreement, that it should be put into writing, it is held to take it out of the statute.

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[*] Lord *Chancellor*. — I take that to be a single case, and to have been over-ruled. (12) If you interpose the medium of fraud, by which the agreement is prevented from being put into writing, I agree to it, otherwise I take Lord *North's* doctrine "that if it had been laid in the bill, that it was part of the agreement that it should be put into writing, it would

(10) See Beam. Elem. Pl. 181. hereon.

(11) Quite settled now accordingly. Vide 16 Ves. 37. 39, 40.

(12) See Beam. Elem. Pl. 181. hereon.

have done," to be a single decision, and contradicted, though not expressly, yet by the current of opinions.

Mr. *Madocks*.—This is a parol agreement stated in the bill with allegations of a part-performance, and that the plaintiff with the defendant's privity, has made an agreement with a third person, to let him a lease of the premises, that it is fraudulent in the defendant not to empower the plaintiff to perform that agreement. The defendant pleads the statute, and avers that no written agreement was signed between the parties. The question is, whether that plea is a complete answer to the relief, so that if the plea is replied to, and the plaintiff cannot produce an agreement in writing, the Court will not execute it. That plea brings it directly to an issue, whether there was an agreement signed. So far it is a plea to the relief, but is it a plea to the discovery, and shall it bar that? But it would be extraordinary, as this Court would decree the performance of the agreement if admitted by the defendant, that this should be held a good plea to the discovery. Mr. Baron *Eyre's* idea in *Stewart v. Careless*, was, that all the cases in the books which had been determined on the defendant's admission, were cases where the statute was not insisted upon. The plea was over-ruled, because there were allegations of part-performance which ought to be answered.

Lord *Chancellor*.—Over-ruling the plea, was taking from the defendant his power of insisting upon the statute in his answer, unless the plaintiff excepted.

Mr. *Madocks*.—There seem to be some expressions in that case, that look like Baron *Eyre's* idea, that the defendant in his answer did not insist upon the statute. *Croyston v. Banes*, and *Symondson v. Tweed*, show that if the defendant admits the agreement, without insisting on the statute, the Court must carry it into execution. Here the allegation is, that of a part performance, the validity of which cannot be argued upon the plea, but must be reserved to the hearing.

[*] Lord *Chancellor*.—Supposing you to have laid a sufficient part-performance in your bill, I cannot conceive the plea would have held; it would have been like Lord *Aylesford's* case, where the agreement was carried into execution, and the plea of the statute over-ruled. But the great point is, whether you can plead the statute of frauds, without supporting the plea by an answer, averring that there was no parol agreement. (13) *I put out of the case all the facts, charged in the bill as a part performance, considering them as weak and trivial, and by no means amounting to a part-performance*; and my determination now goes upon the bill, as brought to enforce the performance of a parol agreement. (14)

In *Child v. Godolphin* (15), before Lord *Macclesfield*, in 1723, a bill was brought for the specific performance of an agreement to assign a lease held of the dean and chapter of *St. Paul's*, the plea was as to such part of the bill as went to the assignment of the lease, it set forth the clause of the statute, and averred that neither the defendant or any other person authorised by her, had signed any writing or note concerning the assignment of the lease, saving a letter in the plaintiff's bill mentioned, which was brought to her ready wrote by the plaintiff, who desired her to sign it as a letter of recommendation, and insisting that this was not such a writing as was within the statute, the terms of the agreement not being expressed therein. The case was argued before Lord *Macclesfield*, by great and eminent counsel, when the plea was ordered to stand for an answer, with liberty to except; and, upon a re-

(13) This seems clearly wrong, and some mistake of the reporter.

(14) Mr. *Dickins* states Lord *Thurlow* to have said ultimately, "if there ever were a case on which the statute of frauds was intended to attach, it must have been this." 2 Dick. 666.

(15) 1 Dick. 39. See the observations of Sir *William Grant* M. R. on Lord *Thurlow's* statement of this case, 6 Ves. 555.

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hearing obtained by the defendant, the order was confirmed, and Lord Macclesfield said, the plea of the statute was right, but that she ought to have denied the agreement by answer, for if she confessed it the Court would enforce it. That if the bill had stated the agreement, generally, a demurrer might have been allowed, but where the agreement is stated to be in writing, the plea must be supported by the answer. (16) Actions at law continue to be brought, as they used to be, upon a general statement of the agreement in the declaration, and the defendant introduces the statute by the plea. So in this Court; but this Court has laid down two exceptions, by which, if they are to be sustained, it amounts to the same thing as if the statute had made the exception of the two cases, that is where the agreement is confessed by the answer, or where there is a part-performance. The consequence is that if the bill [*] states a part-performance, the defendant must answer to the agreement, as well as to the part-performance; according to Lord Aylesford's case, which is founded on extreme good sense. So, where the Court has laid it down as a clear exception from the statute, that the danger of fraud and perjury is avoided, where the defendant admits the agreement. (17) That leads to the doctrine laid down in the Court of Exchequer. If the party may or may not take advantage of the statute, by insisting, or not insisting, upon it, there is no foundation for the exception out of the statute, but if the exception is founded, it makes it like any other equitable case. But what will become of the statute? The bill will not be sustained unless the defendant confesses the agreement by his answer; you shall not prove it *aliunde*. If the bill had only stated the parol agreement without the part-performance, the plea would not have applied, the agreement must be answered. I am aware, that except the case determined by Lord Macclesfield (18), there is no other; the opinion I give is, that if nothing had been stated in the bill but a parol agreement, if the defendant pleads, he must support his plea by an answer, denying the parol agreement (19), the only effect of the statute being that it shall not be proved *aliunde*. If he answers and says there was no parol agreement, I think no evidence that can be given will sustain the suit. If this doctrine be not maintainable, the judgment I am giving is wrong.

Plea over-ruled, and ordered to stand for an answer with liberty to except and to reserve the benefit of the plea till the hearing.

The plea was afterwards re-argued [on the 8th November, 1786,] much to the same purpose as before, and standing for judgment this day, [2d March, 1789.]

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Lord Chancellor, after stating the case, proceeded to this effect. — In this case the agreement stands confessed in the answer. The rule seems to carry a necessary conclusion with it, that whatever in conscience affords a title to the plaintiff, it is impossible to exempt the defendant from disclosing, in order to enable the plaintiff to obtain relief: but the cases have been uniform in that point only; where the defendant has pleaded the statute of frauds, and has not confessed a written agreement, the Court has in no case, compelled the defendant to execute it. The case of [*] *Whaley v. Bagenal*, (6 Bro. P. C. 45.) was so determined upon great argument, in 1768, and has fixed the rule upon a basis of authority, a great deal too strong, in my opinion, to be over-turned or answered. I have, therefore, turned over, with much deliberation, all the cases cited, and all I can find

(16) See note (12) in preceding page.

(17) But if he then insists on the benefit of the statute, he will be entitled to it. 6 Ves. 39, 40, &c.

(18) *Child v. Godolphin*, 1 Dick. 39.

(19) This seems incorrect, and that to such a bill it would be only necessary to plead the statute with an averment in the plea, that the agreement was not reduced into writing, if indeed such an averment be requisite to a bill stating merely an agreement by parol. The ultimate decision on the principal case over-ruled the opinion here stated.

are only two cases, in which relief has actually been obtained upon the agreement so confessed, contrary to the statute of frauds. The first, the case decided by Lord *Macclesfield* in 1723, (*Child v. Godolphin*), (16) where it was held that the plea should stand for an answer. The other (*Cottingham v. Fletcher*) in 2 Atk. 155. was a plea of the statute of frauds, where the party by answer admitted a trust, and it was decreed that the trust should be executed, notwithstanding the statute. (17) The *dicta* are as frequent as the cases, and therefore it appeared to me necessary to consider that branch of the practice which relates to a confession of an agreement not in writing, notwithstanding a plea of the statute.

I should think it was a matter not so much to be supported by a plea, as to be demurred to (18), because the statute says, that an agreement which is not in writing shall not avail, and I do not see any true reason why a demurrer should not hold; although it has been held that an action might be brought upon an agreement not in writing, though stated to be so in the declaration, but that it is impossible to give any evidence of it upon the trial, which is not in writing, which at first sight seems not so conformable to the statute: that rule being adopted at law, might, indeed, be the reason why it was necessary in this Court to plead the statute of frauds. (18)

In the present decision I shall go no further than the case before me, analogous to the case in *Ireland*, but a great deal stronger upon the point upon which my opinion rests.

That case applies to a variety of transactions, and admits that the agreement was not reduced into writing, but insists upon a part-performance. The bill was filed, and merely a plea of the statute put in, no answer, only a general averment, that no writing was signed by either of the parties. The counsel upon both sides agreed in the law according to the reasons given upon both parts of the case, for, in that case, the single question was, whether the plea sufficiently covered the facts stated in the bill; but it was said those facts amounted to a part-performance, and [*] the House of Lords were of opinion upon the face of the bill, that it was no part performance.

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The present case is, that of an insolvent man wanting to dispose of the good will of his public house for a sum of money, and agreeing to part with the fixtures, furniture, &c. at the best rate he could; instructions for an agreement were drawn with a view to the completion of the bargain, and certain conditions were thereby to be made, that the title deeds were to remain with the vendor, and the estate should be conveyed to a trustee, in order to raise 40*l.* a-year, and a bond was to be given as a collateral security, and a person was named to appraise the furniture. The bill states that it remained in suspense from the 3d of *February*, to the 23d of *March*, and upon that day the vendor chooses to be off. It was stated as part of this transaction, that he had entered into this agreement, namely, that the deed for the 40*l.* annuity, should be considered as a re-conveyance, and as a trust that ought to be supported by a collateral security, so that there is much more general matter than merely the agreement stated in the bill amounted to, or to which the statute of frauds might be intended to apply, and it must have been a case where the parties were proceeding with such preparations as were necessary for the final arrangement of the contract. Immediately after the bargain was off, the bill was filed, stating the case, and a plea was put in coupled with an answer to all these particulars. The answer then does not over-rule the plea, because perfectly distinct, and does not apply to a contract, upon which the plea went; and therefore

(16) 1 Dick. 39.

(17) Because the answer over-ruled the plea. See Beames's *El. Pleas*, 37. and the cases there.

(18) But see the note to p. 560, *antea*.

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the plea ought to be allowed. I mean to determine upon the ground of this particular case: because it may come to be more seriously considered what sort of a verbal agreement, notwithstanding the plea of the statute of frauds, may be sustained, as being confessed by the answer, so as this Court will carry it into execution. I am prepared to say, if there be general instructions for an agreement, consisting of material circumstances, to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus penitentiae*, he shall not be compelled to perform such an agreement as that when he insists upon the statute of frauds. I know there must be many other points arising upon it, to settle the contrariety of the rules which have obtained.

Plea allowed.

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Lincoln's Inn
Hull.
3d March.

Testator gives the accumulation of rents till A. should attain 21, to be laid out, and to permit A. to receive the interest during life, after his death he gives the said monies to the issue male of A. and in default to the plaintiffs. A. died without issue, the issue would have taken as purchasers. (1) and therefore the limitation to the plaintiffs takes place.

[*] KNIGHT against ELLIS.

(Reg. Lib. 1788. A. fol. 484.)

ANTHONY Compere, by his will, dated the 28th of July, 1760, having specifically devised certain estates, "devised all the rest, residue, and remainder of his messuages, &c. in the parishes of *Wincome, &c.* or elsewhere, in the county of *Gloucester*, to trustees, their heirs and assigns, upon trust, to permit his grand nephew *Thomas Blizard*, (the plaintiff in the original suit) and his assigns, when he should attain his age of twenty-one years, to receive the rents, issues, and profits thereof, for his life; remainder to the said trustees, to preserve contingent remainders to the first, second, and all and every other the son and sons of the body of the said *Thomas Blizard*, in tail-male, with remainders over to his niece, (one of the present plaintiffs,) and the late wives of the two other plaintiffs, successively, with remainder to his right heirs;" and the testator directed that the trustees should receive the rents, until *Thomas Blizard* should attain his age of twenty-one years, and pay the same as after mentioned, viz. to pay 20*l.* a-year towards the education of his said grand nephew, until he attained eighteen, and if they thought proper to send him to either of the universities, to pay to him 50*l.* a-year until he attained his age of twenty-one, and the testator further declared and devised as follows, "and my will further is, that my said trustees and their heirs shall permit and suffer my said grand nephew, when he shall attain his age of twenty-one years, to receive and take the interest of the monies which shall arise from the rents and profits of my said estates, before my said nephew shall attain his age of twenty-one years, and which shall be placed out at interest as before directed, during his natural life; and after his decease, I give the said monies to the issue male of my said grand nephew, and in default of such issue, I give the said monies to my three nieces, *Mary*, (one of the present plaintiffs,) *Ann* and *Elizabeth Compere*, (the late wives of the other two plaintiffs,) equally to be divided between them, share and share alike," and appointed the trustees executors, who all died in the testator's life-time. In 1764, the

(1) See also the *Attorney General v. Bayley*, ante, 553. In the principal case, the persons who, at the time of the death of A., would have answered the description of his issue male (if any such there had been), would have taken as *persons designate*, in a similar manner as the party's dying without issue in *Lyde v. Lyde*, 1 T. R. 593, was held to mean a dying without children: upon which ground the limitation over was held good in each case. Whether such decisions would be quite free from doubt now is another question. The principal case seems not quite approved of by Sir T. Plumer V. C. who went through most of the authorities with great care in *Lyon v. Mitchell*, 1 Madd. Rep. 386. Vide further, *Britton v. Twining*, 3 Meriv. 176, 182, 183, and the note, post, 573. See also *Biggs v. Benson*, ante, 1 vol. 187.

testator

testator died, and the nieces obtained letters of administration, with the will annexed. In 1765, *Thomas Blizard* the great nephew, then an infant, filed his bill against the administrators of the testator, praying that the will might be established, and the trusts [*] performed, that a receiver might be appointed, and might pay the money by him received into the Bank, to be placed out in order to accumulate for his (the then plaintiff's) benefit, until he attained his age of twenty-one years; and then might be paid to the (then) plaintiff. The cause came on to be heard before Lord Camden, May 2d, 1768, who ordered the residue of the rents and profits, (after paying certain annuities charged thereon) to be laid out in the purchase of stock, and reserved the consideration how the said annuities and the interest were to be applied, till after the plaintiff should have attained his age of twenty-one years, or, in case of his death before that time, till some other person should be entitled thereto.

The balances of the receipts and accounts to *Michaelmas*, 1773, were laid out in the purchase of 421*l.* 14*s.* bank annuities.

The plaintiff, in the original suit, attained his age of twenty-one years on the 16th December, 1774.

The cause came on for further directions, when it was contended on the part of the plaintiff, that the limitation over of the rents and profits was too remote, and that the whole property vested in the plaintiff, the grand nephew of the testator, and, therefore, that he was entitled to a transfer thereof. On the other hand, the then defendants resisted that claim, contending that the plaintiff was entitled only for life, and that, in case of his death, without issue male, they should be entitled to the annuities, in which the accumulated rents and profits had been laid out. Lord Chancellor (*Bathurst*), by his decree, ordered that the receiver should pass his subsequent accounts before the Master, and that the Master should distinguish how much thereof accrued during the plaintiff's minority, and how much after he attained his age of twenty-one years, and that so much as accrued during the minority, should be laid out in the purchase of bank 3 *per cent.* annuities: and the interest to accrue on the same, together with the interest of 421*l.* 14*s.* bank annuities, standing in the name of the accomptant general, in trust in the cause, (the produce of rents and profits formerly invested,) should be paid to the plaintiff during his life: and, on his death, such persons as should be then entitled to the said bank annuities, should be at liberty to apply to the Court for directions touching the same.

[*] The then plaintiff died 28th August, 1784, without issue, intestate, and unmarried, and the present defendant, *Ellis*, obtained letters of administration to his estate and effects.

The present plaintiffs, (being the surviving niece of the testator, and the husbands administrators of the two other nieces who are dead,) on the 1st November, 1785, filed the present bill of supplement and revivor, praying the benefit of the former decree, and that the principal sum of 4843*l.* 9*s.* 5*d.* 3 *per cent.* consolidated annuities (purchased with the accumulation of rents and profits of the estate, before the late plaintiff attained his age of twenty-one years) with the interest thereof, from the last day of payment previous to the decease of the late plaintiff, should be transferred to the plaintiffs in equal third parts or shares.

The cause was set down on bill and answer, and the only question was under the devise, whereby the testator ordered the accumulation of rents and profits before the grand nephew attained his age of twenty-one years, to be laid out, the interest paid to him for life, and then gave the money to the issue of the grand nephew, and in default of issue to his three nieces.

This cause came on to be heard the 4th and 6th of January, 1788, when

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Mr. Mansfield and Mr. Stanley for the plaintiff, contended, that the question had been decided at the hearing before Lord Bathurst, and that the order had settled the rights of the parties: that the monies were invested in the funds, in the name of trustees, and, under the words, the grand nephew took only an estate for life. Had the words been, *heirs of his body*, it would have been an absolute estate in the grand nephew, *Stanley v. Leigh*, 2 Wms. 685. *Sheffield v. Lord Orrery*, 3 Atk. 283. Here no estate was given to the first taker, he is only to receive the dividends and interest, and, after his death, the principal is given over. If it had been a devise of real estate in the same terms, it would not have given him such an interest as to enable him to suffer a recovery and bar the limitations, consequently he had only a life estate. In cases where it has been determined otherwise, the principal has been given to the first taker for life. (2) The grand-nephew having had no issue, the contingency never [*] happened, and no interest vested in him, therefore the limitation over must prevail.

Mr. Scott, Mr. Pechell, and Mr. Fendal, for the defendants, — insisted the order in 1774, did not decide the interests of the parties. It was not then ripe for decision, for the contingency of his having children might have taken place: the representatives of the first taker may therefore litigate their claims with the plaintiffs, under the sanction of the order, which gives the parties liberty to apply. If the first taker had had issue, a question might have arisen between him and them, as to their respective interests, whether he took a life interest only, and they the remainder, as purchasers at his decease, or he had the whole interest. There is no distinction now between the principal and the interest being given to the first taker, the distinction has been over-ruled since *Smith v. Cleved*, (2 Vern. 38.) as in *Butterfield v. Butterfield* (3), 2 Vesey, 133. 154. *Daw v. Pitt*, Fearn, 347. (*Tothill v. Earl of Chatham*, 6 Brown Par. Ca. 450.) (4) *Stanley v. Leigh* is not applicable, for the limitation there was to the defendant *Hussey*, for the remainder of the term, in trust to raise, by sale or mortgage, and, after payment thereof, to permit her nephew to receive all the rents and profits, and there the persons to take at the death of the first taker were not heirs male generally, but it was to the first son of *Francis Leigh*, who, when he took, would take absolutely. — In *Pelham v. Gregory*, 5 Bro. P. C. 435. if it had been a trust in land, it would have been an estate tail; in this case, had it been land, it would have been an use executed in the first taker. *Burchet v. Durdant*, 2 Ventris, 312. *Broughton v. Langley*, 2 Lord Raym. 873. *Jones v. Lord Say and Seal*, 1 Eq. Abr. 383. *Shapland v. Smith*, (*ante*, vol. i. p. 75.) in which case there is a distinction as to realty and personalty; for, in the one case, heirs male are words of limitation, in the other they are not: the authorities decide this to be an estate tail, *Sonday's* case, 9 Rep. 127. *Robinson v. Robinson*, 1 Burr. 44. It is too much to argue that the interposition of a trustee should make such a difference, as to convert that interest into an estate for life, which would,

(2) It was not so in *Butterfield v. Butterfield*, 1 Ves. 133. 154, which is expressly noticed by Lord Hardwicke, who yet held the property to vest absolutely in the party. See further on this case in the next note. It appears quite settled now, that whatever gift, if of land, would have amounted to an estate tail either directly or constructively, will, in the case of personal estate, pass the absolute interest. *Lord Chatham v. Tothill*, in Dom. Proc. (7 Bro. P. C. 453. 8vo. edit.) cited per M. R. in *Britton v. Tunning*, 3 Meriv. 183.

(3) In *Butterfield v. Butterfield*, it appears from Reg. Lib. that the words in the *last* clause, referable to *Thomas B.* and immediately before the limitation over, were, "*should die without issue*," not without "*heirs*," as stated in 1 Ves. 133. *Vide Supplement, B.* This brings the case nearer to the present, and it is observable, that Lord Hardwicke held, on great consideration, that *T. B.* took an absolute interest. See the first note to the present case, *ante*.

(4) See on that case 3 Ves. 101., 1 Meriv. 282., 3 Meriv. 183.

otherwise, have been an estate tail; the gift to the issue male, supposing more than one, is to the issue male, not in words of succession, but with an apparent intention to pass, absolutely, to that issue, and, in the same manner, to the niece, so that the testator had, in his contemplation, the idea of the thing given. In the case of the *Attorney General v. Bayley*, [*] (at the Rolls last Term) the gifts were to the parties as tenants in common, and not as joint-tenants. Then the question is whether it is a gift with a view to succession. On the other hand, if the first taker took only an estate for life, as in *Clare v. Clare*, Ca. Temp. Talb. 21. such words being used as would admit of a contingency, without admitting such an intention in the testator, it would be difficult to raise a contingency with a double aspect.

With respect to the devise over, it is too remote, 1 Roll's Abr. 610. devise to one and the heirs male of his body, remainder over, the limitation after dying without issue is void—*Forth v. Chapman*, 1 Wms. 663. In *Pinbury v. Elkin*, 1 Wms. 563. the words *living at the time of his death* were supplied, but they cannot be so here. The words here are general, *Green v. Rod*, Fitzgib. 68. *Beauclerk v. Dormer*, 2 Atk. 308. *Dod v. Dickenson*, 8 Vin. Abr. 451. *Saltern v. Saltern*, 2 Atk. 376.

Mr. Mansfield in reply.—The plaintiffs are nieces of the testator and objects of his bounty. When this cause came before the Court in 1775, the point certainly was decided; *Blizard*, the nephew, was then of age, and was entitled to have the money unless the limitation over was considered as being good.—The state of the present case lays out of it all those cases where terms for years or other personal estates are given to a man, with a remainder to the heirs of his body, which are held to give an absolute estate to the first taker, as in *Butterfield v. Butterfield*, and in *Daw v. Pitt*; for in this case there is no gift of the thing itself, during the life of the nephew, but, after his death, a gift to the issue male of his body, which, in many cases of real estates, will make them take by purchase; they are only construed words of limitation, when the intention appears that the parties shall take as heirs. Where a man gives a real estate to one, and, if he dies without issue, remainder over, the law says, he meant to give an inheritance, which cannot be effected without giving an estate tail, but applying the same construction to the same word, united to a gift of personal estate, is absurd, as it defeats the issue to whom the testator meant to give it.—But, in this case, suppose it had been real estate, and the words *heirs of the body* had been used, it would not have been an estate tail; for the first estate would have been a trust estate, and would not have united with the legal estate afterwards given to the *heirs* of the body, the land would have gone to the executors during the nephew's life and then the land itself to the issue.

[*] Lord Chancellor.—Suppose there had been three sons?

Mr. Mansfield.—It would have gone to all of them.

Lord Chancellor.—That makes all the difference; the question is, whether they are words of limitation. If it went to one son, it must be by way of limitation: if to all, it must be by purchase. If it is to go by way of limitation, then it vested in the ancestor, if by purchase, all the sons must take.

Mr. Mansfield.—The bequest to the issue is after the decease of *Blizard*, and not till then. The cases cited by Mr. Scott do not apply, they have not, as this has, a marked distinction between the thing and the profits.

Lord Chancellor.—There is no limitation here to the estate of the trustees; the gift to the issue is a gift of the trust, and must remain so till executed by them. If it had been a trust to *A.* during the life of *B.* remainder over, the two estates could not have united.

Mr. Mansfield.—In *Stanley v. Leigh*, 2 Peere Wms. 685. One possessed

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ressed of a term devised it to *A.* for life, remainder to his first and other sons in tail successively, remainder to his daughter, or if he should have neither son nor daughter, to *J. S.*; *A.* dies without ever having son or daughter. The devise to *J. S.* is good—there all must take place within the limitation; if there had been issue, the limitation would have been defeated, if no issue, the whole goes over.

Lord Chancellor.—Suppose there had been a son who died in the life-time of his father?

Mr. Mansfield.—In *Sheffield v. Lord Orrery*, 3 Atk. 283. Lord Hardwicke says, “no limitation over of a personal thing can be admitted after a general dying without issue, but, if this is confined within a life or lives in being, or within ten months, or the birth of a child, or, in case of the death of such child under twenty-one, or if limited on a contingency, to a person who never takes, the limitation is good.”—Whenever a son was born, the estate would have vested: and, although this might admit of an argument, it must certainly vest at the death of *Thomas Blizard*, when it would appear whether there was issue or not, and that issue could not take a term, or any thing personal, but as [*] purchasers. *Robinson v. Robinson* was a very singular case. The Attorney General *v. Bayley*, at the Rolls last term (*antea*, 553.) was a devise of long terms of years to *Richard Bayley* and others as trustees, in trust, for the testator's brother *Tristram*, to have the use thereof for so long as he should live, and from and after his death, to permit and suffer all the children of *Tristram* to enjoy the same in such shares and proportions as *Tristram* should appoint, or if *Tristram* should survive such children, and die without issue, after the death of two persons of the name of *Tolcher*; then to a charity.—*Tristram* was held to take an absolute interest. (4) Upon reading the will, the case appears to be a very different one from this—besides it underwent a very slight discussion, and probably upon further consideration would receive a different decision. (4) *Clare v. Clare* is contradicted by *Higgins v. Dowler*, 1 Wms. 98. (5) *Stanley v. Leigh*, 2 Wms. 685. where a person gives, as in this case, personal property over to three persons *in esse*, in default of issue male of his grand-nephew, what is the common acceptance of men, but that he means a failure of issue during the lives of the devisees over? Some other cases have been mentioned, but they do not apply. In all these cases it has been the rule to make the devise good, as far as the intention can be effected, as in *Humberston v. Humberston*, 1 Wms. 332. *Forth v. Chapman* turned upon the word *leaving*, and was decided in order to support the old decision in *Pinbury v. Elkin*. *Rod v. Green*, in *Fearne*, is not similar to this, *Brooks v. Taylor* turned on the words *then living*. *Saltern v. Saltern* did not at all depend upon *dying without issue*; there is no case but *Clare v. Clare*, where an express devise to (6) heirs of the body has been defeated by the insertion of remainders over. In the present case, the nieces are residuary legatees, the rents and profits are separated from the real estates, and expressly given as money, the gift is in terms which are naturally words of purchase, and the case of *Stanley v. Leigh* decides this point in favour of the plaintiff.

Lord Chancellor.—Lord Camden, when this cause was before him, certainly thought this was an estate for life, and that the money would

(5) It was reversed on appeal. *Vide antea*, 553.

(6) “And by the certificate in *Sabburton v. Same*, Forr. 250. and the reversal of Lord Talbot's decree, by Lord Hardwicke, mentioned in the note on *Stanley v. Leigh*, 2 P. W. 699.” From Lord Redesdale's notes.

(7) *Clare v. Clare* was a devise to issue male. That devise was not defeated by the insertion of remainders over; but Lord Talbot was of opinion the remainders over were too remote a contingency, and decreed the term to the representative of *Thomas Carr*. *Thomas* was the residuary legatee of his father. See Forrester, 21. From Lord R.'s notes.

go over after the death of the grand-nephew. It is very probable he was induced to that opinion by *Clare v. Clare*,—it is impossible when Lord Talbot determined that case, [*] he could have forgotten (7) the case of *Stanley* against *Leigh* †, which had been decided but two years before. The parties have acquiesced in Lord Camden's opinion, which was extremely injurious to the first taker, if he was entitled to the whole. The issue male, if they take as purchasers, must take as joint-tenants, very differently from the method of taking by limitation.—The default of issue must be the default of issue of the first taker. In *Clare v. Clare*, the words were words of strict settlement, yet the determination there appears rather contradictory, I do not remember a case where the first taker takes it for life only, and the subsequent takers take by limitation. The case from the Rolls does not misplace the general rules, *Saltern v. Saltern* shews that where a chattel is given over for want of issue, it vests absolutely in the first taker. The *Attorney General v. Bayley*, whether well or ill determined, contradicts Lord Camden's opinion here.—But there is no pretence here to say the words meant issue living at his death.

The cause stood over, and came on for judgment this day. Lord Chancellor (after stating the parties, the object of the suit, and the several proceedings, and observing that the whole of the decree, upon further directions, was material to understand the present case) proceeded to this effect:—I think that decree has so far disposed of the question, that, if I had been of a different opinion from what I am, I must have altered that decree; for it was impossible to tie *Blizard* up to receive the interest only for his life, if he was entitled to the absolute possession of the fund itself: but I think it is pretty plain, that, under this will, *Blizard* took only an interest for life in the fund in question; and that it was only a contingency on which it was to go to his issue male; and that the plaintiffs take the fund in the alternative of that contingency. I observe, that in a book of great character, and which has treated the subject with great diligence and attention, I mean Mr. *Fearne's* essay on the learning of contingent remainders, after citing and discussing all the cases on this head in the Court of Chancery, he concludes by laying it down as the rule of this Court, that it will go every length possible to carry the intention of the testator into execution, for the benefit of those to whom the testator designed [*] a benefit. It must have occurred to the judges who have decided those cases, that, under the idea of making the rules of decision as to leasehold estates analogous to those which are applied to estates of inheritance, the intention of the testator must be much oftener disappointed than carried into effect, and, then, there is no wonder that the Court should try to get out of the technical rule by any means it can. Now, what do the cases come to? A man, by his will, devises to *A.* for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to *A.* and any other gift would be effectual after his death. The testator then gives the same fund over to *B.* after failure of issue of *A.* What is

† What he is reported, by Mr. *Forrester*, to have said, shews that it was very slightly remembered. (8)

(8) *Stanley v. Leigh*, was before Sir Joseph Jekyll M. R. *Higgins v. Dowler*, 2 Vern. 600. was also cited. The difficulty in this case, and the difficulties under which Mr. *Fearne* felt himself, seem to have been produced by the decision of Lord Talbot, in *Clare v. Clare*, For. 21, and *Sabburton v. Sabburton*, For. 55. 245.; and by not attending to the decree of Lord H., in *Sabburton v. Sabburton*, upon the judge's certificate, mentioned in P. W.'s note on *Stanley v. Leigh*, 2 P. W. 699. From Lord R.'s notes.

(9) On the contrary, it is stated as founded on *Higgins v. Dowler*, and that there were thoughts of appealing from the Master's decree. From Lord R.'s notes.

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the Court to do? It is clear that a life interest only is given to *A.* (9) It is clear that no benefit is given to *B.* while there is any issue of *A.* The consequence is, that, as no interest springs to *B.* and no express estate is given after the death of *A.* the intermediate interest would be undisposed of, unless *A.* were considered as taking for the benefit of his issue as well as of himself; and, as the words, in this case, are capable of such amplification, the Court naturally implies an intention in the testator, that *A.* should so take, that the property might be transmissible through him to his issue, and he was, therefore, considered as taking an estate tail, which would descend on his issue. (9) Now an estate in chattels is not transmissible to the issue, in the same manner as a real estate, nor capable of any kind of descent, and therefore, an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker (9); but if the testator, without leaving it to the necessary implication, gives the fund expressly to the issue, they are not driven to the former rule, but the issue may take as purchasers, and, then, there is an end of the enlargement, of any kind, of the estate of the tenant for life; for another estate is given, after his death, to other persons, who are to take by purchase: it no longer rests on conjecture. The word *issue* used in a will, certainly, is considered as creating an estate tail, and that, because the context puts on the word an import which it has not naturally; but in a feoffment it is not a word of inheritance, and a gift to *A.*, and the issue of his body, gives only an estate for life. On the whole, I think that the issue, if any, would have taken as purchasers, and that, in the event that has happened, of there being no issue, the other limitation to the plaintiffs took place.

(10) *Vide antea*, 558, et 3 Meriv. 182, 183. See also *Gibbs v. Davies*, Mosely, 269. and 3 P. W. 26. &c. and Mr. Sanders's note to *Hodgson v. Bussy*, 2 Atk. 89. with the preceding references.

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In Court,
Easter, 1789.
Lincoln's Inn
Hall.
12th March
1789.

A creditor
giving the prin-
cipal debtor
further time for
payment,
releases the
surety. (1)

[*] NISBET against SMITH and Others.

(No entry.)

WILLIAM Maynard, being seised of a plantation, &c. called *New River Estate*, in the island of *Nevis*, by indentures 17th and 18th August, 1767, granted the same in mortgage to *William Blomberg*, Esquire, for securing the sum of 5000*l.*, and interest. This estate was afterwards charged with the balance of a current account between *William Maynard* and Messieurs *Mills* and *Swanston*. On the 18th of May, 1775, *William Maynard* borrowed of *Ann Blomberg* (his daughter, widow and administratrix of the said *William Blomberg*) 6000*l.*, and charged the same by deed of that date, and further secured the same by his bond.

Mrs. Blomberg, soon afterwards intermarried with the plaintiff, who having considerable estates in *Jamaica*, subject to an incumbrance of 6500*l.* to the defendant *Culling Smith*, proposed to release his right to the above sums of 5000*l.*, and 6000*l.*, making together, 11,000*l.*, on having his estate disincumbered of the sum of 6500*l.*, which it was indebted to the defendant *Culling Smith*; and, accordingly, by inde-

(1) This decision was approved of and confirmed by Lord Loughborough C., in *Rees v. Berrington*, 2 Ves. jun. 540, 543, 544. Lord Redesdale's notes refer also to the decision of *Skip v. Huey*, 3 Atk. 91., noticing Lord Hardwicke's mention of the rule, at page 93, that "He who trusts most shall lose most." See also *S. P. Boulbee v. Stubbs*, 18 Ves. 21. *Samuell v. Howarth*, 3 Meriv. 272. Et vide, 277, &c. *Eyre v. Bartrop*, 3 Madd. 221. &c. 6 Ves. 734. & Bailey on Bills of Exch. p. 152. and the notes. (edit. 1813.)

tures, *April* the 14th, 1779, between the plaintiffs *Nisbet* and his wife of the 1st part, defendant *Smith* of the 2d part, and defendant *Josiah Maynard* of the 3d part, reciting the above, and that *Josiah Maynard* had agreed to pay the said sum of 6500*l.*, so remaining due from plaintiff *Nisbet* to defendant *Smith*, he, the said plaintiff, agreeing that the estates comprised in the said indentures of the 17th and 18th of *August*, 1767, and the 18th of *May*, 1785, should be transferred to defendant *Smith* for better securing, in the first place, the payment of the said 6500*l.*, and interest, and, subject thereto, to the said *Josiah Maynard*, he paying the said sum of 6500*l.*, and interest to the said *Culling Smith*, on or before the 14th of *April*, 1783, subject to such equity of redemption as should be subsisting thereon: and reciting that the said *Josiah Maynard* had, in pursuance of his said agreement, entered into a bond, dated the 8th of *April*, then instant, together with the said *Walter Nisbet*, to the said *Culling Smith*, in the penal sum of 13,000*l.*, for payment of the said 6500*l.*, to the said *Culling Smith*, on or before the 14th of *April*, 1783; and, for indemnifying the said *Walter Nisbet* from the payment of the said sum of 6500*l.*, he, the said *Josiah Maynard*, by his other bond, dated the same 8th of *April*, became bound [*] to the said *Walter Nisbet* in the sum of 13,000*l.*, conditioned to be void on payment by *Josiah Maynard* to the said *Culling Smith*, of the said 6500*l.*, and keeping the plaintiff *Nisbet* indemnified therefrom; it was witnessed, that, in consideration of the premises, and of the bond entered into by the defendant, *Josiah Maynard*, and plaintiff, *Walter Nisbet*, and of the agreement of the said *Culling Smith* to accept the said bond and securities, in lieu of his mortgage on plaintiff *Nisbet's* estate, the said *Walter Nisbet* and *Ann* his wife, conveyed the said estate, and the sums of 5000*l.*, and 6000*l.*, secured by the indentures of 1767, and bonds of 1775, to the said *Culling Smith*, with a proviso, that, in case *William Maynard* should pay to the said *Culling Smith*, on or before the 14th of *April*, 1780, the principal sum of 6500*l.*, together with such sums as he should have paid to *Swanston* and *Mills*, on account of the debt due to them by *William Maynard*, with interest, and if the said *William Maynard* should pay to *Josiah Maynard* the sum of 4500*l.*, residue of the said sums of 5000*l.*, and 6000*l.*, the said *Culling Smith* should re-convey the premises to *William Maynard*; and, in default of such payment, if the said *Josiah Maynard* or *Walter Nisbet* should pay to the said *Culling Smith* the said 6500*l.*, and such other monies as aforesaid, on or before the 14th of *April*, 1783, with interest, as therein provided, the said *Culling Smith* should convey the mortgaged premises to the said *Josiah Maynard* and *Walter Nisbet*, subject to *William Maynard's* equity of redemption therein: and, in the said deed, there was contained a covenant from the said *Josiah Maynard* with the said *Culling Smith* and plaintiff *Nisbet*, to pay to the said *Culling Smith* the said 6500*l.*, according to the condition of the bond: and it was further witnessed by the said indenture, that, in consideration of the premises, and of the said bond of the 8th of *April*, then instant, and of the said *Josiah Maynard's* agreement to pay the said sum of 6500*l.*, &c., to the said *Culling Smith*, the said *Walter Nisbet* and *Ann* his wife conveyed the said sums of 5000*l.*, and 6000*l.*, and the securities for the same, to the said *Josiah Maynard*, subject to the interest of the said *Culling Smith*, and to the equity of redemption of *William Maynard* therein.

William Maynard did not pay the money in 1780, neither did *Josiah Maynard* pay the same at the stipulated time, the 14th of *April*, 1783; upon which the plaintiff called upon the defendant [*] *Culling Smith*, to compel payment, by *Josiah Maynard*, who, accordingly, swore to his debt, and held *Josiah Maynard* to bail for the 6500*l.*, but *Maynard* prevailed with *Smith* to waive further proceedings, on his giving a warrant of attorney to confess judgment. Upon which warrant, a memorandum was

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indorsed, by which it was agreed, that no execution should issue on the judgment, for the term of three years, from the 14th of April, 1783, in case the interest should be regularly paid. (2)

The bill stated this transaction, between *Smith* and *Maynard*, to be agreed upon without notice to the plaintiff, and prayed that the defendants might deliver up the plaintiff's bond, and that the same might be decreed to be satisfied, as far as it related to the plaintiff, and that the defendant *Smith* might execute such instrument in writing as should be for that purpose approved of by one of the Masters of the court, effectually to release and discharge the plaintiff from the payment of the said 6500*l.*, and from every security and engagement relative thereto.

The defendant *Smith*, by his answer, insisted upon the benefit of the said plaintiff's bond, and that he was to be deemed a principal and not a surety, and consequently, liable to answer the payment of the said 6500*l.*

And the question was, whether the plaintiff was a surety only (3), and, as such, entitled to the relief prayed by his bill.

The cause came on in *Easter Term, 1785.*

Mr. Mansfield and *Mr. Thompson*, for the plaintiff, contended that the plaintiff was only a surety, and the defendant *Smith*, having made an agreement with *Maynard* for postponing the payment without notice to the plaintiff, could no longer hold him as a surety. 1 *Eq. Abr.* 79. *He has varied the contract, which has become a new one merely between him and Maynard. The case is like that of a man indorsing a bill of exchange, and guaranteeing the payment, if the indorsee gives any time for payment he varies the contract, and releases the guarantee of the indorser, who is no longer liable. So here, supposing the plaintiff a surety, the contract is changed by Smith allowing the three years for payment, and consequently there is an end to the plaintiff's liability.*

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[*] *Mr. Madocks*, and *Mr. Scott*, for the defendant, contended, that the transfer of *Maynard's* mortgage to *Smith*, was merely a substitution of one security for another, and that the plaintiff continued personally liable. *Parsons and Cole v. Briddock*, 2 *Vern.* 608., is something like this case. The plaintiff *Nisbet* might still sue *Maynard* upon the bond, — there is no case directly analogous to it, and no principle to support the bill. *Nisbet* never was accepted by *Smith*, as a mere surety.

The cause stood for judgment 12th *March, 1789.*

Lord Chancellor, stated the case, and proceeded to the effect following: The plaintiff *Nisbet* complains of this transaction as unjust, as it gave a credit for three years longer than the bond imported, contrary to his inclination, who was the surety named in it; in addition to which circumstance the plaintiff had not only never consented to such credit being given, but had pressed the obligee to bring his action upon the bond which was so brought and compromised, without the privity and consent of the plaintiff so bound in that bond. — The first question which was argued was, *what is the equity in respect of the surety in the bond.* [It is clear and never has been disputed (4)] that a surety, generally speaking, may come into this Court, and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money, and deliver him from the obligation (5): but this case differs from the common

(2) See the *Lord Chancellor's* observations. 2 *Ves. jun.* 544.

(3) *Lord Redesdale's* notes make a query here whether the plaintiff was a surety only.

(4) From the notes of *Mr. Cox.*

(5) See per *Lord Keeper*, in *E. Randalph v. Hayes*, 1 *Vern.* 190. and 1 *Eq. Ca. Ab.* 79. But it must be observed, that a bill will not lie upon any general equity by a surety against the principal debtor, to have an indemnity, or to have the money paid into court, where no further time has been given, where the day of payment has not elapsed, and the surety has not been damaged, or is not in evident danger of being so; or unless it might be proved that it should be done whenever the plaintiff called on him for it.

common case, which forces the surety into this Court to be so relieved, as the obligee had done that very thing which the Court would have compelled him to have done, namely, to bring his action; but, *contrary to that case and the faith of that action, has given credit to the principal debtor beyond the term originally stipulated in the bond, at the expense of the surety.* The answer insisted upon is, that Josiah Maynard was not principal debtor, but that Nisbet the plaintiff was become so; and, upon looking into the answer, the party, I observe, has been, unwarily, drawn in to swear that fact; but it is contrary to the evidence of the transaction, and there is not a shadow of doubt as to that matter, there being a covenant respecting the 6500*l.*, which is, expressly, stated to be in lieu of that bond in which Nisbet became the principal debtor. In the next place Nisbet had given up the debt of 11,000*l.*, in favour of Josiah Maynard, who joined in that bond, and Culling Smith the defendant, was a party to that agreement, consequently bound by that consideration, [*] as if the consideration had been given to himself, and, therefore, became so charged, and it was no longer to be deemed the principal debt of Nisbet; but Josiah Maynard had become the principal debtor, and the plaintiff a mere surety. It has also been said, that an action might have been brought on the covenant, but that could only be by Smith: all the circumstances show that the principal debtor and his surety had joined in the same bond, and the creditor has called upon the surety to remain longer, as such, by three years, than he originally stipulated for; but, in the mean time, thinks fit to compromise the action, under an idea that the surety would comply: therefore, the mere question is, whether he should oblige the surety, contrary to his express consent, to remain as such for a longer time than he bargained for at first; and I am of opinion that he cannot do that, and though the prayer of the bill is not so framed as to let in any particular relief, I think the best relief I can give is, to decree a perpetual injunction against Culling Smith, to restrain him from suing the plaintiff on this bond.

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So decreed per totam curiam in the Exchequer, Trin. Term, 1808, 4th July. *Dale and Perry v. Lolley*, where the bill was dismissed with costs. And the Court held that Lord Thurlow's allusion, in this place, to the surety's equity, is applicable only to the above, and that any other decision would quite overthrow the very reason of a party's becoming surety at all, and be absurd.

Such a bill has been filed and a decree made, which ought never to have been done; and Lord Eldon C., observed it was a strange and anomalous decree. The cause was *Clarke v. Stamford*, Chancery, 16th June 1801, and the Master's Report, 25th June, 1802. The decree was, according to the prayer. That the principal should pay the debt, and discharge the plaintiff as surety. The obligee was a party, and acted upon the decree. This was observed as above, *per Lord Eldon C.*, 26th May, 1805, first term after Easter Term, upon a motion by Mr. Hollist in the above cause. (Mr. Hollist saying, that, in fact, such a decree ought never to have been made.) Editor's MS. notes.

WARD against ST. PAUL.

(Reg. Lib. 1788. B. fol. 323. b.)

THE plaintiff was Anna Maria Ward, a natural daughter of the late Lord Viscount Dudley and Ward. Lord Dudley made his will the 10th of July, 1788., and, thereby, made a very ample provision for the plaintiff, and he appointed his wife, Mary Viscountess Dudley and Ward, and Henry Jerome de Salis, to be guardians of the plaintiff during her minority, and the testator died on the 9th of October following.

Rolls,
April 28th.

When a father, by his will, names guardians for his natural child, the Court will appoint them guardians, without any reference to the Master. (1)

(1) *S. P. Peckham v. Peckham*, 2 Cox, 46. which is also cited in Mr. Brown's notes at the end of this case.

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The suit was instituted by the plaintiff, for carrying the trusts of the will into execution, and

On the petition of the plaintiff, that the said Lady Viscountess *Dudley and Ward*, and *Henry Jerome de Salis* might be appointed her guardians by the Court, and they appearing now in court, and consenting to accept such guardianship, his Honor thought there was no necessity to refer it to the Master, to approve [*] of proper persons to be guardians, the father having named them by the will, though strictly speaking he could not appoint testamentary guardians to a natural child. And his Honor made the order accordingly. †

[S. C. 2 Cox,
46.]

† The same had been done by the Lord Chancellor, in *Peckham v. Peckham*, in the year 1788, where the late *Harry Peckham*, esq., having a natural daughter, by his will appointed *Mrs. Farhil*, *George Rous*, esq., and *Gibbs Crawford*, esq. to be her guardians, and, on petition, his Lordship appointed *Mr. Rous* and *Mr. Crawford* (some objections being made, by the infant, to *Mrs. Farhil*), to be guardians, without any reference to the Master.

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[*] EASTER TERM.

29 Geo. 3. 1789.

SPRANGE against BARNARD, and Others.

(Reg. Lib. 1788. B. fol. 354.)

Rolls, [30th
April and] 4th
May.

Wife, having a power to dispose by will, signed and sealed by her, of 300*l.* in the hands of trustees, having made a will agreeable to the power, afterwards makes a testamentary paper, by which she gives it to her husband; but so much as shall be remaining at his death, &c. to her brother and sisters. This paper is not sealed [found annexed to the will by a wafer, and is] on a stamp.

His Honor held [the annexation by the wafer immaterial, and that] the stamp was equivalent to a seal. (1) Secondly, that it vested absolutely in her husband, and it was decreed to be paid to him, the property not being sufficiently certain to raise a trust. (2)

(1) Lord Redesdale questions this part of the decision, on the reasons given, referring to *M'Adam v. Logan*, *postea*, 3 vol. 310.; Mr. Sugden also thinks the decision wrong. Sugden on Powers, 226, 227.

(2) S. P. *Wynne, v. Hawkins*, *antea*, 1 vol. 179, and the cases in the Editor's notes. See also *Harland v. Trigg*, *ibid.* 142.

and

to transfer the said 300*l.* stock to her brother, defendant *John Crapps*, and to defendants *Rose Wickenden* and *Elizabeth Bauden* (her sisters) to be equally divided between them, and appointed defendants *Barnard* and *Reeves* executors of her said will. On the 11th of *November*, 1787, the plaintiff's wife *Susannah* made two testamentary papers, the one of them beginning, "This I desire may be done as my last will and testament." She then [*] desired that her husband would give some cloaths, &c. to her sisters and a niece, and the paper went on as follows: "I bewill to my husband, *Thomas Sprange*, the sum of 300*l.*, new joint stock annuities, for his sole use, and all that is remaining in the stock, that he has not necessary use for, to be equally divided between my brother *John Crapps*, and sister *Wickenden*, and sister *Bauden*, to be equally divided between them; and if either of them be dead, for to go between them that is living, to be equally divided between them, &c." This was written on unstamped paper, and was only signed by the testatrix. The testatrix thinking that it was material that her will should be upon stamps, afterwards, on the same day, made the following testamentary paper: *November* the 11th, 1787. "This is my last will and testament at my death, for my husband *Thomas Sprange*, to bewill to him the sum of 300*l.*, which is now in the joint stock annuities, for his sole use; and, at his death, the remaining part of what is left, that he does not want for his own wants and use, to be divided between my brother *John Crapps*, my sister *Wickenden*, and my sister *Bauden*, to be equally divided between them." The testatrix, having fixed the two papers together with a wafer, requested two witnesses to attest the same, which they did, and the testatrix declared the same to be her will, and delivered it to the defendant *Reeves*, who kept the same till after her death. *July* the 26th, 1783, the wife died, and, no executors being named in the last testamentary paper, the husband took out administration with the papers annexed, and applied to the trustees to transfer the stock to him, which they refused: upon which refusal, the plaintiff filed the present bill, insisting, that, under the said paper, he was absolutely entitled to the 300*l.*, the testamentary paper being either an execution of the power, or a revocation of the former will, and, of course, that he was entitled, as administrator of his wife.

This case was argued the 14th of *February* last.

Mr. Scott and *Mr. Trower*, for the plaintiff, contended, that the Court could take notice only of the papers that were proved in the ecclesiastical court, and that, by them, the defendants had not such an interest as would raise a trust in the husband: that, in order to do this, the property, as well as the person, must be certain; but that, in the present case, the husband had a power of disposition, as to the whole fund, so much only [*] being to go over, as he should not find it necessary to use. That very strong words of recommendation had been held in the cases not to raise a trust. *Le Maitre v. Bannister*, [cited *antea*, p. 40.]

Mr. Ainge, for the defendants, said, this differed from the other cases in this respect, that, here, the legacy is in the trustees, not the legatee: therefore, it is not a request to him to dispose of the legacy in the particular manner, and insisted that the 300*l.* ought to be impounded by the court, and the legatee to apply, for such parts as he might want, from time to time.

It stood over for the defendants to propound the former will to the ecclesiastical court for probate; but it having been propounded before without success, and the object being too small to bear the expense of a litigation there, the defendants did not proceed.

It stood for judgment the 4th of *May*.

His Honor stated the case with its circumstances.

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The first question is, whether the testamentary paper was signed, sealed, and delivered by the testatrix, as her will; and *I think the stamp equivalent to a seal, without having recourse to the wafer which annexed the stamped paper to the former* (3); therefore it is an instrument executed according to the power. Then the words are a bequest of the 300*l.* South Sea annuities to his sole use; and all that is remaining in the stock, that he has not necessary use for, to her brother and sisters; or, as she expresses it afterwards on the stamp, "At his death, the remaining part of what is left, that he does not want for his own wants," to the brother and sisters. The husband has taken out administration, and filed his bill for the sum. It is contended for the persons to whom it is given in remainder, that he shall only have it for his life, and that the words are strictly mandatory on him to dispose of it in a certain way; but it is only to dispose of what he has no occasion for; therefore, the question is, whether he may not call for the whole; and it seems to me perfectly clear on all the authorities, that he may. I agree with the doctrine in *Pearson v. Garnet*, (*ante*, 38 — 226) following the cases of *Harland v. Trigg*, *ante* [*] vol. i. p. 142.,) and *Wynne v. Hawkins*, *ibid.* 179.) that the property, and the person to whom it is to be given, must be certain, in order to raise a trust. Now here, the property [*so far from being certain, that what is given*] (4) *is only what shall remain at his death*. The cases are so much in point, that they are scarce worth mentioning: they are *Bland v. Bland* (stated, *ante*, p. 43.) *Le Maitre v. Bannister* (stated, *ante*, p. 40.) *Wynne v. Hawkins*, where, not doubting, would have been sufficient to have raised the trust, had it not been for the uncertainty of the following words: *Palmer v. Scribb*, 2 Eq. Abr. 291. is not worth mentioning. Then the present case is, "so much as he shall not want for his wants." It is contended, that the Court ought to impound the property, [and exercise its discretion in judging from time to time what he may want (5);] but it appears to me to be a trust which would be impossible to be executed. I must, therefore, declare him to be absolutely entitled to the 300*l.*, and decree it to be transferred to him. The costs to come out of the 300*l.*

(3) Lord Redesdale's notes question this case on the reasoning here assigned, and doubt whether it was necessary to the decision. His lordship refers also to *M'Adam v. Logan*, *postea*, 3 vol. 110. *Vide* also Sugden on Pow. 226, 227.

(4) This evident substitution for the unmeaning word "*wasting*," in the other editions, is from Mr. Cox's notes of the judgment.

(5) From Mr. Cox's note of the judgment.

MADOC [MADDOCK] against JACKSON.

(Reg. Lib. 1788. B. fol. 292.)

Where property is settled on husband and wife for life, remainder to the issue, subject to a power of appointment, an interest vests in an only child, though no appointment was made. (1)

(1) This doctrine is undoubted law, and the opinion of Lord Thurlow was as expressed here; but it was not the point determined in this case (see 4 Ves. 792. note, and 1 Scho. and Lefroy, 293.), although there was some discussion on it. Lord Redesdale's MS. notes state the fact, that "this question arose only incidentally in the cause, the Court being of opinion, on other grounds, that there was no foundation for the plaintiff's claim, and dismissed the bill.

"One question was, whether the plaintiff, claiming under a voluntary limitation in the settlement, and not stating that as the ground of claim, could insist upon that title against the second husband of the wife, who had in her widowhood removed the land as her own property, and settled it on her second marriage; notice of the first settlement not being charged in the bill, nor that settlement made the ground of the plaintiff's title, which was stated under an old will, and which totally failed as stated."

case

cease of the survivor, to go to such issue, in such proportion, manner, and form as they or the survivor should direct, limit, and appoint.

The wife survived the husband, and there was issue one child only, who died during her survivorship; no appointment was made.

Lord Chancellor was of opinion that an interest vested in the child, and seemed to doubt the case of *Maddison v. Andrew*, 1 Vesey, 57., if it was to be considered as determined on the idea, that the children could not have succeeded if no appointment had been made.

[Bill dismissed.]

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MADOC
against
JACKSON.

[*] ROBINSON, surviving Assignee of WILLIAM STUART, a Bankrupt, Administrator and personal Representative of MARY STUART, his late Wife, which MARY STUART was one of the next of Kin of ROBERT BRADLEY, deceased. - - - Plaintiffs.

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JAMES TAYLOR, RICHARD GUEST, WILLIAM STUART, THOMAS MARSH, the Elder, THOMAS MARSH, the Younger, MARY WILKINSON, and ALICE HOWARD. - - - Defendants.

(Reg. Lib. 1788. B. fol. 550. b.)

THE bill stated that *Robert Bradley*, by his will, dated 21st October, 1771, and a codicil dated 24th November, 1771, after several legacies, gave all the rest, residue, and remainder of his real and personal estate, to his executors thereafter named (1), upon trust, that they or the survivor of them, or his heirs, shall sell and dispose of his houses and lands to the best advantage, and for the most money they can, after his sell his houses, &c. and thereof, and out of the remainder of his personal estate,] to pay annuities—and then to pay the produce to A. for life. One of the trustees and executors has a legacy. Held that the executors have no beneficial interest; and that so much of the residue as arises from the real, is a resulting trust for the heir 2), and the rest a trust for the next of kin. [Upon a petition to vary the minutes, the Lord Chancellor retained his opinion, and refused the application without prejudice to a re-hearing. It was never, however, applied for. (3)]

Testator gave the rest and residue of real and personal estates, [to his executors therein after named (1) upon trusts to

(1) It is observable, that Sir W. Grant M. R., referring to this case, and to this particular clause, lays great stress upon the difference between a bequest in such cases as here, "to the executors thereafter named," and one to certain persons nominatim upon trusts which do not exhaust the whole subject matter. See in *Dawson v. Clarke*, 15 Ves. 416. Lord Eldon, C., though he affirmed *Dawson v. Clarke* on the appeal, did so under its particular circumstances, and disapproved of the above distinction. Vide 18 Ves. 253, 256, 257. but Sir W. Grant afterwards most respectfully stated, that he still retained the same opinion. Vide in *Southouse v. Bate*, 2 Ves. and Beames, 398, 399. See also *Batteley v. Windle*, ante, 31., and *Pratt v. Sladden*, 14 Ves. 193, &c.

It must be noticed that Mr. Brown's statement of the will agrees exactly with Reg. Lib.; and that Sir W. Grant's observations (15 Ves. 416) on Mr. Brown's omission in this case, applies only to his not having inserted that part of the decree which was relative to the personal estate. Lord Eldon C. also observes, (18 Ves. 254.) "So little doubt was [in the principal case] entertained that the executors could take no beneficial interest, that the great question was whether the form of the devise of the real estate, with a trust to sell it, had not so far converted the produce of it into personalty that the next of kin would take the whole."

It may be observed with respect to the generality of the position appearing (18 Ves. 254.) that if an executor takes a residue beneficially *quâ* executor, a case of lapse will not form part of such residue. That lapsed legacies will accrue to such executor, see *Wilson v. Iant*, 2 Ves. 168., and Supplement 317, 318., which refers also to *Bennet v. Batchelor*, 1 Ves. 67.

(2) Vide *S. P. Berry v. Usher*, 11 Ves. 97. 91. *Williams v. Coad*, 10 Ves. 500. (therein cited) and the references.

(3) Vide *S. C.* 1 Ves. jun. 44.

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decease, and put and place the money arising therefrom, as well as the rents and profits thereof, in the mean time, out to interest, upon the best security they can get for the same, "and *thereout and out of the remaining part of my personal estate* pay unto my cousin *Betty Marsh*, during her natural life, one annuity, &c. of 10*l.* (he then gave other annuities and legacies, and continued as follows): And as to all the rest and residue of the money which shall be then out at interest, I do hereby order and direct, that the same shall remain out at interest, for and during the life of my cousin *Mary Stuart*, and in case she shall live separate and apart from her husband *William Stuart*, then and in such case, I order and direct that the yearly interest arising from the said surplus money, shall be paid to her sole and separate use, but in case she shall live with, or have any connexions with her said husband, then, in such case, I hereby order my said executors or the survivor of them, to pay her no more interest, but to let the interest accumulate unto the time of her death, and I do hereby further order that in case *James Stuart*, son of my said cousin *Mary Stuart*, shall behave dutifully, and to the satisfaction of his said mother, that she may at any time during the term of her natural life, by her last will and testament duly [*] attested, charge and make chargeable my said estate, with the payment of the sum of 400*l.* to be paid to the said *James Stuart*, by my said executors, or the survivor of them, his executors or administrators, within six months after her decease," and appointed defendant *James Taylor* and *Richard Guest*, executors of his will, "hoping they will see the same duly performed" (4), with the common clauses, as to the receipts being sufficient discharges for the money for which the premises should be sold for their indemnity from each other's acts, and reimbursing themselves the expenses of the executorship. By the codicil, he gave to his clerk, *James Taylor*, (one of the executors,) a legacy of 100*l.* The testator died in 1771, leaving *Mary Marsh* his heiress at law, under whom the defendant *Thomas Marsh*, senior, and *Thomas Marsh*, junior, claimed, and the executors proved the will, entered into possession of the estate, and sold the same. *Mary Stuart* continued to live apart from her husband, from the death of the testator till her own death in 1784, and the executors paid to her, during that time, the interest and profits of the clear residue of the testator's estate both real and personal. *Mary Stuart*, previous to her death made her will, and, thereby, pursuant to the power, appointed the sum of 400*l.* in favour of her son *James Stuart*, and appointed executors of her said will, who having renounced the execution thereof, administration was granted to defendant *William Stuart*, her husband. In 1778, a commission of bankruptcy issued against said *William Stuart*; and the plaintiff, together with *Leak* and *Atkinson*, were chosen assignees, and *Leak* being dead, and *Atkinson* having been removed from being an assignee, plaintiff is now the surviving assignee; the plaintiff, therefore, claimed that the testator not having disposed of the residue of his real and personal estate, (the real estate being by the will directed to be sold, and having been converted into money,) the same was become distributable at the death of *Mary Stuart*, among testator's next of kin, one of which she was, and as such, entitled to one third part thereof; that the same, therefore, vested in *William Stuart* at the time of his bankruptcy, and under a new assignment of his estate (which the bill stated to have been made to plaintiff,) he was entitled to the same. The bill therefore prayed an account, and that the plaintiff might be declared to be entitled to one third part of the residue, or surplus of the testator's estate, as assignee of said *William Stuart*, and that the same might be paid to him.— The

(4) See this noticed (*inter alia*) by Lord Eldon C., in *Dawson v. Clarke*, 18 Ves. 254. defendants

defendants *Taylor* and *Guest* by their answers claimed the residue of the real and personal estate, as undisposed of, in their character [*] of executors, and that they were not trustees thereof, the legacy to *Taylor* not excluding the rights of both as joint tenants of the same. The defendants *Mary Wilkinson*, *Thomas Marsh*, senior, and *Alice Howard*, by their answer claimed the other two-thirds as next of kin. *Thomas Marsh*, the younger, as heir at law submitted, that, although testator's real estate was by the will directed to be sold, yet, inasmuch as *the money arising therefrom was not disposed of* (5), such money should be considered as remaining in the nature of land, and belonging to him as heir at law. *William Stuart*, by his answer, contended the interest of his wife was an interest vested in him at the time of his bankruptcy, and claimed the same, as a new acquired estate after he had obtained his certificate.

This cause was heard 27th June, 1786, when the necessary accounts and enquiries were ordered, and it now came on for further directions respecting the interests of the several claimants. (5)

Mr. Solicitor General and Mr. King for the plaintiff. — The bill was filed by the assignees of the bankrupt, against the executors of *Bradley*, two sets of next of kin, (those at the death of the testator, and those at the death of *Mary Stuart*,) the husband and the heir at law. The plaintiff contends that the third part of the residue of the estate passed to the husband, and through him to the assignees of which he is survivor. We are to argue, 1st, That the assignees became entitled against the claim of the husband, who contends that it did not vest in him till the death of his wife, when he had obtained his certificate, but it clearly vested in her upon the death of the testator, and, consequently, in the husband, as a contingent interest, and assignable by him, subject to the equity of having a provision made for her out of it. 2dly, The executors contend, that they are not trustees; but it is a mere devise in trust to them — it is given upon the trusts after-mentioned, so that the testator has shewn, by the tenor of the will, that he meant them to be only trustees. It is more clearly so than if he had given them equal legacies, which would, clearly, have made them mere trustees. This also is apparent from the devise of the real estate; unless he meant to make the executors devisees of the real estate for their own benefit, it will be difficult to contend, that the personal estate was to be so disposed. 3dly, With respect to the heir at law. — The testator has converted [*] the estate, out and out, into a personal fund, the trust is, to sell the whole, and to apply the rest and residue, by which, the testator meant, the produce of the whole to the use of *Mary Stuart* for life. This is within the cases of *Mallabar v. Mallabar*, Forrester, 79. *Durour v. Motteux*, 1 Ves. 320. and *Ogle v. Cooke*, which is in 1 Ves. 177. but the material part of the case is not there reported, but the Master of the Rolls, in giving judgment in *Fletcher v. Ashburner*, [ante v. 1. p. 497.] 11th December, 1778, stated that case of *Ogle v. Cooke* (19th February 1748,) as follows. Mr. *Ogle* made his will in 1744, and gave his real estate to trustees to sell, and to vest the money in stock, and pay the interest to his wife during her widowhood, and, after her death, or marriage, to his two daughters equally, except that the eldest was to have 1000*l.* more than the other, he gave the rest of his personal estate in the same way, he, afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust to sell so much as should be necessary to pay the debt, and, as to the residue, in trust for Mrs. *Ogle*; part of the

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(5) The Master amongst other things, certified that the whole of the real estate had been sold by the defendant, *Taylor*, for 650*l.* 17*s.* R. L. See the directions in the decree as to this, in favour of the heir, *postea*, 594.

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estate was sold, and then Mr. *Ogle* died. This younger daughter died in his life-time. The bill was brought by the widow, and the elder daughter, against the son, who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the younger daughter as personal estate of Mr. *Ogle*, to be divided between them and the son, as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will, and, if not, that the share of the dead daughter was to be considered as real estate of Mr. *Ogle*, and descended to him as heir. It was determined, that the conveyance was a revocation only, *pro tanto*, to let in the debt; and that so much of the estate as remained unsold should be sold, and that the money raised or to be raised by sale of the estate, made part of the personal estate of Mr. *Ogle*. *Scudamore v. Scudamore*, Pre. Ch. 543. was a case, where money to be laid out in land was considered as converted into land. *Durour v. Motteux*, 1 Vesey, 320. the will was held to have converted the estate into personalty; that case does not come up to the present, on account of the inference arising from the gift of the residue. In *Mallabar v. Mallabar*, Forest. 79. when 500*l.* was given out of the money to be raised by the sale, to a party who died in the life-time of the testator; Lord *Talbot* inferred, from the heir at law having a legacy, (6) that *Esther* should take the personalty, and the money raised by the sale of the real estate. (6) — Mixing the two [*] funds has been considered as showing the intention of the testator, that the whole should be converted into personalty. In the case of *Ackroyd v. Smithson*, [*ante*, vol. 1. p. 503.] March 4th, 1780, which is against us, the heir at law contended the shares of the deceased legatees continued real estate. At the Rolls, that case was decided in favour of the surviving residuary legatees, but upon an appeal, it was determined for the heir at law, on this principle, that although the testator had converted the fund, he had done so with an intent to give it to particular persons, and, if the shares did not go to those persons, they should not be considered as converted, but that the testator died, as to them, intestate. There was a case of *Trafford v. Dickenson*, in the Dutchy Court in 1785, very similar to *Ackroyd v. Smithson*. There was no decision, although there was much argument; Lord *Ashburton* and Baron *Eyre* differing about the authority of *Ackroyd v. Smithson*. In the present case, the testator intended to convert the whole into money, and it cannot be contended that it was with a view to giving it to any particular person. Nothing is more clear, than that he meant the fund produced from the whole should be a fund for all the purposes of the will. His intent to blend the two funds appears from his calling the whole *money*. Under this description, *Mary Stuart* could not take the rents and profits, because that was not money at the time, it is clear, therefore, he meant the whole to be converted.

Mr. *Hardinge* —, for an annuitant whose annuity was charged on the aggregate fund, and also for the next of kin; also argued that the whole fund was converted into personalty, and that it was impossible to differ this from former cases on the subject, in all of which, if the funds were mixed, and the whole given to *A. B. and C.*, though the object should fail, still it was converted as against the heirs into personal estate.

Mr. *Attorney General*, for the husband, cited *Jacobson v. Williams*, 2 Will. 382. to show that, the wife never having become entitled to this gift, the commissioners could not assign, it being only a possibility.

Mr. *Pigot*, for the heir at law. — There cannot be any question but that the estate undisposed of goes to the heir at law; in all the cases, the question has been, in what sense the testator has meant the terms he

(6) *See vide contra* *Randal v. Boocky*, Pre. Ch. 162. which seems good law. That a legacy does not exclude next of kin from personalty. See *Andrew v. Clark*, 2 Ves. 162. *Farrington v. Knightley*, 1 P. W. 544. Lord *North v. Purdon*, 2 Ves. 496. *Skey v. Wood*, 10 Ves. 71. *Griffiths v. Hamilton*, 12 Ves. 310.

has made use of, and whether he has intended [*] to give the whole of his estate, whether real or personal. Here, the testator has kept up a distinction between the funds, by the terms he has made use of; he has mixed it only for the particular purpose of giving the whole produce to Mrs. Stuart for life, and has made no further disposition, so that the heir at law stands in the same favourable light which every heir at law does, where there is nothing more than a life estate disposed of. *Digby v. Legard*, 3 Cox's Pr. Wms. 22. note.

Mr. Mansfield and Mr. Abbot, for the executors. — This is very different from any of the cases where the executors have been declared to be only trustees. It is true, trusts are annexed to their claim, but there is hardly any case where the executors have taken before the other purposes of the will have been performed. Here the testator has, expressly, given the residue to the executors, and had it in his mind to take, out of their hands, all he meant so to do, a life estate to Mrs. Stuart, and a power to dispose of 400*l.* to her son. — She was one of the next of kin; if he did not mean her to take in that character, he did not mean the other next of kin should take, he meant, therefore, that the rest should go to the executors. — A distinction has been drawn, that, as the real estate must be in trust, so the personalty must be in trust likewise, but the purpose being to pay charges, does not, necessarily, convert the whole into a trust. In a case of *Lloyd v. Wentworth*, the devise was all the residue (of real estate) I give to my wife, to enable her to pay my debts, legacies, and funeral expences. The heir at law argued that, as it was to enable her to pay debts, &c. it was only a gift in trust, and therefore that, after payment thereof, it was a resulting trust for him, but your Lordship held it went absolutely to the wife. In *Rogers v. Rogers*, 3 Wms. 193. the court held that the wife took beneficially. So, in *Hill v. Bishop of London*, 1 Atk. 618. but this is a stronger case, for, though it was a trust to a certain extent, beyond that, the testator did not intend it so, and at the expiration of the annuities, no further trust remained.

Lord Chancellor. — Nothing can be so clear, as that if this was a gift to a stranger in trust, it would be a pure trust, I am therefore much surprised that there should be no case of this sort, where the executor has been held a trustee. — The difficulty is to find that an unsold (7) residue of real estate can, by any means, go from [*] the heir at law. Inferences have been admitted where the testator has not expressed himself clearly, to show that he meant to convert the real, into personal, estate. If it is, once, deemed sufficient that he meant it to be turned into money, to make it the same as if it had been money before his death, then you will have the testator declaring that he did so. In all the cases, it has been, where he meant it to be converted, out and out, that the testator meant it should become money, but the question is, whether he meant it to be the same as if it had been money before his death. It has not been held to be part of the personal estate; but to be disposed of as if it was part of the personal estate. The heir at law is entitled to the residue, as a resulting fund. *Ackroyd v. Smithson* received great weight from the other cases which agreed with it, and from *Digby v. Legard*, as quoted. I do not see how the personal representative can ever get at that which was not personal, at the death of the testator, but by an express direction — therefore, I think the heir at law, here, is entitled to the residue of the real estate as a resulting fund. (8)

The

(7) No such difficulty was in this case, for the Master had certified that all the testator's real estate had been sold; and that the defendant Taylor had received the proceeds, amounting to 650*l.* 17*s.* R. L. See the decree in the following note.

(8) "And as to the clear residue of the said personal estate, after the payments and appropriations before directed. His Lordship doth declare, that the defendants, the

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The bankrupt's claim is out of the case; it vests in the assignees, the moment of the testator's death, as an assignable interest.

"executors of the said testator, are not entitled thereto; and that the same is divisible into 10 equal parts amongst the rest of kin of the said testator. And his Lordship doth declare, that the defendant T. M., the younger, the heir-at-law of the said testator, is entitled by way of resulting trust, to the sum of 650l. 17s. produced by sale of the said testator's real estate;" and the Master was to enquire at the expence of Mr. Taylor, the executor, whether it had been disposed of, and how, and whether it had been productive. R. L.

The executors afterwards attempted to alter the Lord Chancellor's opinion upon a petition to vary the minutes; but his Lordship refused the application, without prejudice to a rehearing. They did not, however, apply for one. Vide S. C. 1 Ves. jun. 44, 45.

[Vide S. C.
Cooke, B. L.
264. 6th edit.]

Ex parte CLOWES in the Matter of LIVESSEY, HARGREAVE, and others, Bankrupts.

Creditor of
partners, on
bond, for money
which came to
the use of the
partnership may
prove against
the joint or
separate
fund. (1)

LIVESSEY, Hargreave and others, being partners, the petitioner had lent upon separate bonds of *Livesey*, to the amount of 5300l., of *Hargreave*, to the amount of 7200l.; he also held joint notes of *Livesey* and *Hargreave*, to the amount of 660l. The money, though lent on the individual securities of the respective parties, had come to the use of the partnership; and, there being several other debts of the partners under the same circumstances, the partners in 1781, being then solvent, came to an agreement to consolidate these debts, and that they should be considered as the debts of the partnership.

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The partners having become bankrupts, and there being a joint commission against them, the petition was to be admitted [*] to prove these bonds, &c. under the joint commission, and that separate accounts might be kept, with an election to the petitioner, to prove against the joint estates of the bankrupts, or the separate estates of *Livesey* and *Hargreave*.

Mr. King, for the petitioner, relied upon the agreement among the partners, in 1781, as having the effect of an acknowledgment that the money came to the use of the partnership, and, therefore, that the petitioner ought to be at liberty to prove against the joint estate.

Mr. Solicitor General opposed the petition, upon the ground that where the loan was only to one or two partners, the demand could be only against those one or two.

But, Lord Chancellor thought that, as the money was admitted by all the partners to have come to the use of the joint fund, it would entitle the creditors to consider themselves as joint or several creditors, and therefore to prove against the joint or separate estates, it being a joint debt, in respect to its having come to the joint use, and separate from the nature of the security.

It stood over to another day, when Lord Chancellor made the order. (2)

(1) Lord Eldon C. approved of the principal case; but observed that "it turned upon the particular circumstances." See in *Ex parte Bonbonus*, 8 Ves. 546. See also the case of *Burton, Forbes, & Co.* noticed on the judgment, *ibid.* and the case of *Ex p. Bonbonus* itself, 8 Ves. 540. *Ex parte Lobb*, 7 Ves. 592. *Ex parte Le Forest*, Cooke, B. L. 266, &c. Lord Redesdale's notes, refer also to *Ex parte Apsley*, post. 3 vol. 263. in which the Lord Chancellor says, that "the agreement of the partners to consolidate the separate debts made the difference." See further Christian's Bankrupt Law, 2 vol. 42. 305.

(2) See the order, Co. B. L. 265.

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[S. C. Cooke,
B. L. 153, 154,
6th edit.]

Ex parte LEEKE in the Matter of BECKETT.

THE bankrupt was executor of a deceased person, the petitioner was a creditor of the bankrupt's testator, to the amount of 286*l.* — 432*l.* of the effects of the deceased were in the bankrupt's hands. The petition was to be permitted to prove this demand against the bankrupt's estate.

Mr. *Mitford* in support of the petition said, the only doubt was, as to the manner of proof; that a person should be appointed to collect the testator's goods, to be administered in a course of administration. The doubt entertained, upon a former day, was, whether Lord Chancellor sitting in bankruptcy could appoint [*] a receiver—but that the thing had been done in two cases. *Ex parte Llewellyn*, (2) — *Ex parte Ellis*, 1 Atk. 101.

Lord Chancellor. — I apprehend, in strictness, the bankrupt ought to be admitted a creditor, for that which he has as executor, against his own estate: but, it would be evidently improper to suffer the money to come into the hands of the bankrupt. In the present case, there is nothing but money in the hands of the assignees, and the creditor has such an interest in it as to entitle him to have it retained in court. — If the property was considerable, I would not proceed without a bill (3); but, as it is, let the bankrupt be admitted a creditor for 432*l.* and let the assignees pay the dividends into the bank, subject to further order. The assignees to retain 40*s.* out of the dividend for their costs.

Creditor of bankrupt's testator (to whom he was executor) (1) admitted to prove the amount of testator's property in bankrupt's hands, the dividend to be paid into the bank, subject to further order. (1) [*597]

(1) See Cooke, B. L. 150, 151, 152, 153. which also refers to *Ex parte Brooks*, S. P. and *ex parte Shakeshaft*, *postea*, 3 vol. 198.

(2) Cooke. B. L. 152.

(3) Or if the matter is complicated, as in *ex parte Markland*, 2 P. W. 546.

Ex parte MOORE in the Matter of TYLER.

IN 1785, the petitioner purchased and shipped a cargo in the *West Indies*, by order of the bankrupt, which, with charges and commission, amounted to 2200*l.* For his re-imbursement, the petitioner, in pursuance of a previous agreement with the bankrupt, drew bills of exchange to the amount, which were presented to the bankrupt for acceptance, at different periods, between the 17th of *March* and the 22d of *April*, 1785. The bankrupt accepted one, which was afterwards paid;

Costs arisen from the protesting of bills, shall not be proved unless antecedent to the act of bankruptcy. (1)

(1) Lord Eldon C. observed in *Exp. Hill*, 11 Ves. 647. that Mr. Cullen had stated the doctrine on these subjects very ably in his work on the Bankrupt Laws, from p. 104. &c. and his Lordship in that important case, entering into an historical view of it, seems to have elucidated the true principle so very satisfactorily, that the practice soon became established on a sure foundation.

It seems, in the result to have become settled, that the precise amount of a debt or of costs must be ascertained, by taxation, or actual judgment, before the act of bankruptcy committed. Vide *Ex parte Charles*, 16 Ves. 256, &c. The party there accepted the case proposed; and after a most able argument, and mature consideration of the Court of K. B.; it was held that the debt due upon the judgment which was entered up after the bankruptcy was not sufficient to support a commission; although the verdict was obtained previous to the bankruptcy. Vide 14 East, 197. The editor would have thought that in the case of costs, the Courts of Law and Equity could not have remained in so uncertain and contradictory a practice on the subject up to the commencement of the 19th century, had they not attended to the decisive judgment of Lord Hardwicke, that costs do not become legally due, or a certain duty decreed until they have been taxed. See in *White v. Haywood*, *Johnson v. Peck*, and *Kemp v. Mackrell*, 2 Ves. 461. 465. 579.

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the others were noted for non-acceptance, and afterwards protested for non-payment, at different periods between the 18th of *June* and the 22d of *July*. The protested bills were afterwards taken up, by the petitioner, in *September* and *October*, who paid the same, together with damages and several charges, amounting to 298*l.* besides which, interest had accrued to the amount of 46*l.* 10*s.* On the 5th of *May*, 1785, the act of bankruptcy was committed, but the bankrupt continued in trade till *January* following. Upon the 9th of *March* 1786, the commission issued. In *March* 1788, a petition was preferred to be let in to prove the value of the bills, with the charges and interest. Upon the hearing of the petition, an order was made that the petitioner might go before the commissioners, and prove such debts as he might be advised, and to be admitted a [*] creditor for what he should prove. The commissioners admitted him to prove the value of the bills, but refused to admit him a creditor for the costs and charges of protest. The present petition was for the purpose of being admitted to prove these costs and charges.

Mr. *Selwyn* and Mr. *Simeon* in support of the petition. — The costs and charges, in the present case, ought to be admitted to be proved, on the same ground that, where a verdict is obtained before a bankruptcy, the costs afterwards are permitted to be proved, as having relation to the verdict. *Aylet v. Hartford*, 2 Blackst. R. 1317. *Blandford v. Foote*, Cowp. 138. which was upon an application to discharge the defendant out of custody, and it was held that, the cause of action being before the bankruptcy, the costs were also discharged, *Longford v. Ellis*, (1) *Easter Term*, 1786. In this case, all the bills were protested before the commission issued. Lord *Hardwicke*, in an anonymous case, 1 Atk. 140. admitted costs, of protesting bills, accrued before the commission of bankrupt issued, though he refused those subsequent to the commission. Mr. *Simeon* also cited, *Francis v. Rucker* (2), before Lord *Camden*, 6 *July* 1768, where the plaintiff being a merchant living in *Pennsylvania*, had orders from the bankrupt living in *London*, to buy a cargo of corn, and to draw for the amount of the cargo. The plaintiff, accordingly, bought a cargo amounting to 32,000*l.* which he sent, according to orders, and drew 160 bills for the amount, some of which were accepted and paid before the bankruptcy. Six were accepted, but protested for non-payment; the others were protested for non-acceptance and non-payment, after the bankruptcy. By a law of 1700, made by the States in *Pennsylvania*, it was enacted, that, on all bills of exchange, drawn or endorsed in *Pennsylvania*, upon *England* or any other part of *Europe*, which were returned protested, the drawer or indorser should pay, to the holder of such bill 20 per cent. over and above the value of the bill, in the specie or currency for which the bill was drawn, for the costs and damages of the protest and return of the bills. The plaintiff, having discharged these bills, together with the 20 per cent, applied, by petition, to be admitted a creditor under the commission, as well for the 20 per cent. which amounted to 6000*l.* and upwards, as for the value of the bills; Lord *Camden*, thinking it a new question, and a matter of great consequence, directed a bill to be filed, which was afterwards done, [*] and the cause came on upon bill and answer, which admitted the above facts; and, upon the hearing of the cause, his Lordship held the whole to be one transaction, and admitted the plaintiff to prove, not only the amount of

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(1) S. C. Cooke, B. L. 200 (6th edit.), 185. former editions; cited, 1 H. Black. 29. and see it several times mentioned, with great disapprobation, by Lord *Eldon* C. on the authority of Lord Keeper *Henley*, &c. in *ex parte Hill*, 11 Ves. 652, 653. &c.; and in *ex parte Charles*, 16 Ves. 257. Its authority was wholly superseded by the ultimate decision of the latter case, *vide* 14 East, 197. &c. See the Editor's first note to the principal case, and *Christ. Bank. Law*, 354.

(2) *Francis v. Rucker*, Ambler, 672.

the bills, but the 20 per cent. paid after the bankruptcy, considering the 20 per cent. as liquidated damages. His decision proceeded on two grounds, 1st, that when the merchant here became bankrupt, he was incapable of paying, and the 20 per cent. became *eo instanti* due. If not so, the 20 per cent. had a reference to the original transaction, and therefore the plaintiff had a right to prove it.

Mr. *Solicitor General*, on the other side — cited a case determined on the 27th of July, 1787, where the bankruptcy was before a verdict, and costs were afterwards incurred, which the Lord Chancellor would not admit to be proved. Lord Camden, in the cited case, thought the acceptor there, had made himself liable to the stipulated damages, which could not be said to become due after the bankruptcy, because they became due by the bankruptcy. So, where a wife had a bond payable on the husband's becoming a bankrupt, Lord Camden said, it could not be after the bankruptcy, because it became due upon his becoming a bankrupt. Your Lordship has since thought otherwise, and has corrected it.

Lord Chancellor. — With respect to the first point, where a debt is contracted, and a verdict obtained before bankruptcy, and there is a judgment after the bankruptcy, if the judgment could not be proved, the debt which is merged in it could not. (1) I do not know whether it was worth while to relieve the creditor at the expence of the general rule, or whether it would not have been better to have left the plaintiff upon the judgment, with his own costs. In the cited case, Lord Camden went on the special act of the colony, that bills which should be returned, should be paid with 20 per cent. beyond the amount of the original bills. The merchant had agreed to accept bills, and some bills were accepted before the bankruptcy; others were returned protested for want of acceptance. Lord Camden said, that the contract, being that they should be accepted, carried with it the contract for the 20 per cent. if they were not so. (2) With respect to the bringing the damages down to the time of the commission, there is no case in which that has been done, where the time of the act of bankruptcy [*] has been fixed. In this case, as the time of the act of bankruptcy is fixed, I cannot carry the damages lower than the act of bankruptcy.

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(1) So ultimately determined in *Ex parte Charles*, above referred to. Vide 14 East, 197, &c. See also the reasoning of Lord Eldon C. in that case, 16 Ves. 257, 258., and in *Exp. Hill*, 11 Ves. 646, 647. &c.

(2) Vide *Ambler*, 675, 676.

Ex parte KEITH [KEEFE]. (1)

KIMBER, a correspondent abroad of the bankrupt, having the bankrupt's books in his possession, was summoned to produce them to the commissioners, but refused so to do, claiming a lien upon them, as a security for money lent.

The bankrupt now petitioned that *Kimber* might produce the books, as without their assistance he could not pass his last examination.

Lord Chancellor refused the order, since the commissioners might commit on refusal.

Order refused to a third person to produce the bankrupt's books, since the commissioners may commit.

(1) From Mr. *Brown's MSS.* See a petition in the bankruptcy, on other grounds, 2 Cox. 193.

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WILLIAM LEWIS, and JEMMY WELLS, and ELIZABETH, his Wife,
(late ELIZABETH LEWIS) - - - Plaintiffs.

GEORGE KING, and HESTER, his Wife, and THOMAS JOHNSON,
Defendants.

(Reg. Lib. 1788. B. fol. 634. b.)

Testator having a debt secured on lands, gives the mortgage money to the mortgagor, and desires that he will give a reversionary interest therein to a third person. The mortgagor selling the estate shall bring the mortgage money into Court, for the use of the devisee, subject to the life estate.

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EDWARD Hawkins, (father of defendant *Hester King*.) by will, dated the 29th of *October*, 1779, gave his copyhold, called the *Nunmead Pool*, situate in the parish of *Staines*, (then in the occupation of *Thomas Rolfe*, and let on lease, with other premises at *Staines*, called the *Nurseries*.) unto the defendants and their assigns, during their joint lives, and the life of the longest liver of them, without impeachment of waste; and, after the decease of the survivor of the defendants, he gave the same to the plaintiffs, *William Lewis*, and *Elizabeth Wells*, as tenants in common in fee. And after reciting that he had lent the defendant, *George King*, 400*l.* on bond, and the defendants [*] had mortgaged to him the lands called the *Nurseries*, (which was the estate of *Hester King*.) he gave to the defendants the 400*l.*, and all interest which should be due at the time of his decease; and directed his executrix to deliver up the bond, cancelled, to the defendants, and assign the mortgage over to them. And, in consequence of his having given up the said bond and mortgage, he desired that the survivor of the defendants would, at his or her death, give the mortgaged premises to the said plaintiffs, in like manner as he had given them *Nunmead Pool*, and made his wife, *Mury Hawkins*, residuary legatee and sole executrix, who proved the will, and delivered up the bond and mortgage, cancelled, to the defendants; but the defendants afterwards sold the estate called the *Nurseries* to the other defendant, *Thomas Johnson*.

The plaintiffs filed their bill against the defendants, stating the above facts, and charging that the directions in the testator's will, as to the disposition of the estate called the *Nurseries*, were imperative; and that the defendants, by accepting the cancelled bond and mortgage, became bound to fulfil the instructions of the testator; and charging, also, that *Johnson*, the purchaser, had notice of the transactions: therefore, praying that the defendant, *Johnson*, might be declared a trustee for them, as to the reversion of the interest in the premises: or that an enquiry might be directed what interest was due on the bond and mortgage at the death of the testator, or had become due since: and the defendant and *Johnson* might join in a re-assignment of the mortgage, on making a proper security on the *Nurseries* for such sum and interest, and the plaintiff declared to be entitled to the benefit thereof, in lieu and satisfaction of the reversionary interest directed to be given to them by the testator's will.

The defendants, by their answer, stated the bond entered into by defendant *King*, and an indenture executed by defendant *King*, and his wife, whereby the defendant *King* covenanted for himself and his wife, to levy a fine of the freehold land in the parish of *Staines*, (the estate of *Hester*, his wife) to enure to the use of *Edward Hawkins*, his heirs and assigns; (with a proviso that if plaintiff, *George King*, should pay the 400*l.*, and interest according to the bond, that then the fine should enure to the use of such persons as the defendants should appoint.) [*] and also to surrender copyhold lands of the said *Hester*, to the use of the said *Edward Hawkins*, his heirs and assigns, upon condition to be void on

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on payment of the 400*l.* and interest; and stated that they levied a fine and made a surrender accordingly, and they admitted the will, and that the executrix cancelled the bond and mortgage; but insisted that the gift of the 400*l.*, and interest, was an absolute gift, and that the clause by which the testator desired that the survivor of the defendants, would give the mortgaged premises to the plaintiff, was recommendatory, not imperative, and also admitted the sale to *Johnson*; and that he had notice. The defendant *Johnson*, by his answer, stated the conveyance to him of the mortgaged premises, in consideration of 490*l.*, in which the indenture and bond, and also the will of the testator, were mentioned, admitted the cancellation and delivery of the bond and mortgage; but said, the 490*l.* was a full and valuable consideration for the purchase, and claimed to hold the same free of any trust.

The cause was heard by Mr. Justice *Buller*, sitting for the Lord Chancellor, [on the 26th of June, 1788;] and, by his decree, it was ordered that the bill should be dismissed against the defendant *Johnson*, with costs; and that the defendant, *King*, should pay the sum of 400*l.* into the bank, with the privy of the accountant-general, to the credit of the cause, to be laid out in 3 per cent. annuities, the interest of such 3 per cent. annuities to be paid to the defendant, *King*, for life; and, after his decease, to the defendant the wife, for life; and, after their decease, the person or persons entitled to be at liberty to apply to the Court for a transfer, the defendant, *George King*, to pay the plaintiffs their costs, and repay to the plaintiffs the costs they should pay to the defendant *Johnson*.

The defendant *Johnson* enrolled this decree of dismissal, but the other defendants [presented a petition of rehearing,] suggesting, that there was not any evidence in the cause that they ever made any mortgage to the testator, except their answer, which they conceived could not be read against the defendant *Hester*, and that no fine was in truth levied, or surrender made of the lands in question: and, therefore, that the lands (being the estate of *Hester*) never were charged with the 400*l.* that they were aggrieved by the decree that the plaintiff, *George King*, should pay the sum of 400*l.* into the bank, &c., and also pay the costs of the suit, and repay the plaintiffs the costs they should pay [*] to defendant *Johnson*, for that the bill ought to have been dismissed with costs against the defendants, by reason that the gift of the 400*l.*, and interest, by the will of the testator, was an absolute unconditional gift, to take effect immediately on the testator's death, and their acceptance thereof, would not oblige the survivor of them to give the premises called the *Nurseries* to the plaintiffs; and, even supposing the gift of the 400*l.*, and interest, to be on the condition of giving the *Nurseries* to the plaintiffs, and that the defendants, by selling the same, had rejected the gift, and made their election not to accept it, yet that the sum of 400*l.* is not given to the plaintiffs, but to *Mary Hawkins*, as part of the residue, and therefore the bill ought to have been dismissed; or, at least, no decree should have been made before *Mary Hawkins*, or her representative, had been made a party.

Mr. *Selwyn* and Mr. *Holt*, on behalf of the defendants, admitted that although it should seem that where a person makes use of the word *desire*, he means to leave some discretion in the party, yet it is too late now to argue that these words do not create a trust, but they contended that it was impossible to go on without having the personal representatives before the Court, there being no gift of the 400*l.* to the plaintiff, in case the defendants should make their election to reject the gift thereof.

Mr. *Mansfield*, for the plaintiffs.—The testator having directed the bond and mortgage to be given to the defendants, upon condition that the survivor should give to the plaintiffs the residuary estate, the plain-

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tiffs were advised they had a lien upon the reversionary estate. But it having been held, that *King's* covenant did not bind the wife, and therefore that *Johnson*, having bought under her, had a good title, the plaintiffs are entitled to come against *King*, for so much as he had defeated the provisions of the will.

Lord *Chancellor*. — This is a very clear case, the 400*l.* and interest is a pledge for the performance of the condition. If the plaintiffs made out their whole case, it would be like that of *Noys v. Mordaunt*, here it is objected, that it is not made out that there was a mortgage to the testator. The fact is, that he has disposed of the estate of another person, giving that person other property; then the party taking the property disposed of, must [*] give up that which was given in exchange for it, to re-imburse the devisee for his disappointment. Every thing the *Kings* take should be brought into court as a security for the purposes of the will.

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Affirmed the decree.

GEORGE BILLINGHURST and Others, Legatees of 1000*l.* each, and likewise Residuary Legatees of GEORGE WOODROFFE. Plaintiffs.

THOMAS WALKER, one of the Executors of the Testator, ANN, his Wife, and WILLIAM BILLINGHURST, which ANN WALKER, and WILLIAM BILLINGHURST, are the Devisees of the Rectory and Tythes of FARNHAM, WILLIAM NEWNHAM the other Executor of the Testator, and other Legatees of 1000*l.* each. Defendants.

(Reg. Lib. 1788. A. fol. 421. b.)

Where one devised a rectory for lives, subject to a charge, although the lease be changed by adding new lives, and a

bond given by the owners of the lease to the devisee, it continues a charge on the church lease, not on the personal estate of the obligor in the bond. (1)

SIR *Thomas Vernon* being seised of the manor and rectory of *Farnham*, under a lease from the archdeacon of *Surry*, for the lives of his three sons *Thomas*, *Charles*, and *George Vernon*, made his will, and, thereby, devised the said rectory, to his son *George Vernon*, on his paying to *Martha Vernon*, the testator's daughter, 2000*l.* as her portion, and also 200*l.* for her wedding apparel, with interest at 6*l.* per cent. per annum.

(1) As to the doctrine on these subjects, see *Lawson v. Hudson*, *antea*, 1 vol. 57. D. of *Ancaster v. Mayer*, *Ibid.* 454. E. *Tankerville v. Fawcett*, *antea*, 57. *Tweddell v. Tweddell*, *antea*, 101. 152. with the Editor's notes on these cases; and see the distinction marked in the *Earl of Orford v. Lady Rodney*, 14 Ves. 417. &c. *Sir W. Grant*. M. R. there (pp. 425, 426.) speaking of the principal case, distinguishes it from the one before the Court, and says, "There, a term of ninety-nine years was created to secure to *Martha Vernon* a sum of 2200*l.* upon premises held for lives. There being a difficulty about the renewal of the lease, it was apprehended that *Martha Vernon* would remain altogether without a security if the lease expired, therefore a bond was given for the money; which, if that apprehension should prove well founded, would be the only security in existence for the debt. The lease was afterwards renewed, and the charge attached upon it. It is clear from the *res gestæ*, that all that *George Woodroffe* meant was, to substitute his bond in the room of that security which it was supposed she was about to lose, but not to take upon him absolutely, and at all events, the debt, as a personal debt of his own. He had no intention, absolutely, to exonerate the estate; for he never would have given the bond except for the particular purpose. It was, therefore, inequitable and unconscientious to say, that although the bond was given only for that purpose, it should be held to attach solely upon the personal estate of *George Woodroffe*. The *bond fide* of the transaction required, that in the event that happened, the lease should be still chargeable, and not the personal estate of *George Woodroffe*."

He also made a codicil to his will, the provisions whereof by subsequent events became immaterial, and died without revoking the same. *Thomas Vernon* dying soon after his father, the lease was renewed (2) 11th October, 1726, for the lives of *George Vernon*, (who was then in possession) *Charles* (then *Sir Charles*) *Vernon*, and *Ann Vernon*, (afterwards *Mrs. Woodroffe*), the only child of *George Vernon*. In 1735, *George Woodroffe*, the testator, married the said *Ann Vernon*, and, previous thereto, a settlement was executed, dated 22d November, 1735, and made between *George Pery* of the first part; *George Vernon* of the second part, *Martha Vernon* of the third part; *George Woodroffe* of the fourth part; and *Sir Charles Vernon* and *Richard Buckley* of the fifth part; reciting that there was then due to the said *Mr. Pery* 900*l.* on a mortgage [*] of the said lease, and also reciting, that said *George Vernon* was indebted to said *Martha Vernon*, in the sum of 2200*l.* no ways secured, and that a marriage was then intended between the said *George Woodroffe* and *Ann Vernon*, and that in consideration thereof, and of the settlement and provision by certain deeds and conveyances, intended to bear even date therewith, by the said *George Woodroffe* to be made for and upon his said intended wife, and the issue of the said marriage; as the marriage portion or fortune of the said *Ann Vernon*, the said *George Vernon* had agreed to give and convey the said premises, and the said lease thereof, to the use of the said *George Woodroffe*, his heirs and assigns, subject to the payment of the said sum of 900*l.* and 2200*l.* and interest, and also subject as is therein aftermentioned. The said rectory and premises were conveyed by the said indenture unto the said *Sir Charles Vernon* and *Richard Buckley* (3) to the use of the said *George Pery* for ninety-eight years, and, subject thereto, to the use of *George Vernon*, until the marriage, in trust, after the marriage, as to the mansion-house, to *George Vernon*, for life. And, as to all the other premises (charged with an annuity of 200*l.* a-year to *George Vernon*) (3) to the use of *Martha Vernon*, for ninety-nine years, (if the lives of the said *George Vernon*, *Sir Charles Vernon*, and *Ann Vernon* should so long continue,) for the better securing the said sum of 2200*l.* and interest at 5*l.* per cent. and subject to the terms, to the use of said *George Woodroffe*, his heirs and assigns. And in the said indenture, *George Woodroffe* covenanted to pay the said 900*l.* to *Pery*, and the said 2200*l.* to *Martha Vernon*, at 5*l.* per cent. *George Woodroffe* soon after his marriage, took possession of the said rectory, and continued so till his death. The lease was renewed on the 1st October, 1737, for the lives of *Sir Charles Vernon*, *George Woodroffe* and *Ann* his wife. After the death of *George Vernon* in 1736, viz. 1st October, 1736, the lease was renewed for the lives of *Sir Charles Vernon*, *George Woodroffe*, and *Ann* his wife. The 900*l.* and interest to *Pery* was afterwards discharged by *George Woodroffe*. In January, 1762, *Ann Woodroffe* died, and 4th April, *Sir Charles Vernon* died, he was the surviving life in the lease assigned to *Martha Vernon*. *George Woodroffe* then became the surviving life in the lease of 1737. On the 4th May, 1762, *George Woodroffe* executed a bond to *Martha Vernon*, reciting the indenture of 1735, being a mortgage of the rectory to *Martha Vernon*, and after reciting, that *Ann Woodroffe* and *Sir Charles Vernon* being [*] dead, his, the said *George Woodroffe*'s, was the only life on which the lease subsisted, and that the then archdeacon of *Surrey*, and the said *George Woodroffe* could not agree upon the terms for the renewal of the said lease, which would become void on the death of said *George Woodroffe*, and that she the said *Martha Vernon* would be deprived of her security for the said 2200*l.*; It was declared

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(2) "In November, 1735." R. L.

(3) The limitation between these figures is omitted in R. L., but the above statement is probably quite correct.

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that the said bond should be void if the said *George Woodroffe*, his heirs, executors, or administrators should pay interest at *5l. per cent.* for the said 2200*l.* during his life, and his heirs, executors, or administrators, should pay the principal, within three months after his death. In *December, 1762*, *Martha Vernon* died, and, by her will, dated *31st March, 1760*, (before the bond was given) reciting, that the said 2200*l.* remained due to her upon the security of the said rectory, she gave the same to *George Venables Vernon*, and *Richard Lackwood*, her executors in trust, to call in the same, and lay it out at interest, and she gave such interest to *Mrs. Woodroffe* for life, remainder to *George Woodroffe* for life, and after his death, she ordered the whole to be transferred to her god-daughter *Martha Vernon*. *George Woodroffe*, *25th January, 1764*, renewed the lease of said rectory, for his own life, and those of *James Shepherd* and *James Rawlins*, and died *30th November, 1779*, having made his last will and testament, dated *3d April, 1778*, and thereby devised the said rectory to his nephew, the defendant, *William Billinghamurst*, and the defendant *Ann Walker*; charged with an annuity of 200*l.* unto *Hester Calverly*, widow, (since deceased) and reciting, that a suit in the Exchequer was then depending, between the vicar of *Farnham*, and him, relative to the tythes of hops, he gave his executors 1000*l.* part of his personal estate to be placed out at interest, in trust, to apply the same to the expences of carrying on such suit; so much thereof as should not be so expended, to fall into his personal estate, he gave several legacies, to be paid within six months after the determination of such suit; he made the plaintiffs residuary legatees, and appointed the defendants *Thomas Walker* and *William Newnham*, executors of his said will, who proved the same, and possessed themselves of his effects, and the devisees of the rectory entered upon the same.

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On the death of *George Woodroffe*, *Martha Vernon*, the younger, god-daughter of the testatrix *Martha Vernon* became entitled by virtue of her will, to the said sum of 2200*l.* In *Trinity, [*] 1781*, the legatees filed their bill against the executors, for an account, and the common decree was made, and the accounts were taken before the Master, and the personal estate applied as far as it would extend, in payment of the legacies, but being very deficient, the legatees have not been paid their full legacies. In the course of that year, the debt was called in by *Miss Vernon*, and 2405*l.* 10*s.* 6*d.* were paid for principal and interest, by defendants *Walker* and *Newnham*, as executors of *George Woodroffe*, and were allowed by the Master in passing their accounts. The plaintiffs who are pecuniary legatees unpaid, and residuary legatees, filed the present supplemental bill praying (*int', al.*) to have this 2200*l.* and interest, paid to them by the devisees of the rectory, or raised by sale thereof. The defendants, by their answer, insisted, that by the several transactions, this was become the personal debt of *George Woodroffe*, the testator.

Mr. Solicitor General was beginning to argue, for the plaintiffs,

When *Lord Chancellor* stopped him, by desiring to hear how it was contended on the other side.

Mr. Mansfield, *Mr. Hardinge*, and *Mr. Hollist* for the defendants—argued either, 1st, that there was no real security at all. 2d, That, if there was it was gone, by the settlement or the bond. The rectory was devised by the will of *Sir Thomas Vernon*, subject to a charge to *Martha Vernon*, which, by the codicil, was to be paid in a twelvemonth. No provision was made for renewals, or that the renewed lease should be subject to the charge.—Then, upon the marriage settlement, *Woodroffe's* contract with *Vernon* was that he should take the debt upon himself; whenever the party shows the intent to be to take the debt upon himself, it becomes the debt of the personal estate. None of the cases consider it as the debt of the real estate; *Belvidere v. Lord Rochford*, 6 *Brown's P.C.*

520. *Parsons v. Freeman*, cited 2 Cox's Pr. Wms. 664. n. In *Tweddel v. Tweddel*, (*ante*, 101—152.) the covenant was with the vendor. But 3d, by the bond it is clear that the debt became the personal debt of *Woodroffe*. The lives were then all dead, by which *Martha's* security was gone; so that the bond was a personal security, and he made an entire new contract, to pay the interest only, during his life, and the principal after his decease. After having given this personal security, *Martha Vernon* could not have compelled him to give a [*] security out of the estate. *Martha Vernon* was dead before he renewed the lease, and her executors received the interest under the bond. If *Woodroffe* thought his personal estate was to pay the debt, that is sufficient to make it liable; that he thought so is clear, from his having devised the rectory, subject to a different charge. It is only by a possible equity that the rectory and tythes can be charged, and such the Court will not raise, where the party, by his contract, has made it a mere personal debt.

Lord Chancellor.—The difficulty is, to distinguish this from the cases referred to by Mr. *Mansfield*. I agree that if the testator has shown an intent to take the debt upon himself, it will become his debt, but, here, the old security remained, and he merely gave a collateral security.

If there was any thing in the marriage contract, which bound him to exonerate this estate from the debt, it would become his personal debt: but there is nothing in the contract like that. Where a man transfers a mortgage, which is not his own debt, his executing a bond as a collateral security does not vary the nature of the charge, it is only a necessary act in the transfer. I do not mean that it does not make him liable personally to the creditor, but it does not throw the charge on his personal estate. (4) Nothing passed here to vary the charge. All the cases of sale have turned upon this, whether the charge was considered as part of the price. The mere purchase of an estate subject to charges, as an equity of redemption, does not make the personal estate of purchaser liable to the charge, *but if the charge is part of the price, then the personal estate is liable*. (4) If the cases afford a demonstration of the intention to pay the money, the personal estate then becomes liable, but being liable to the condition does not make his personal estate liable. The provision for carrying on the suit, is only a special indemnity in respect to one person.—What was the nature of Miss *Vernon's* security? Suppose the estate had failed, and he could not have renewed, she would have had a remedy on the bond, but her natural remedy was against the rents and profits of the estate. The question in these cases has been, whether, by giving the bond, he has made that his own debt, which primarily was not so, and it has been determined that that alone is not sufficient.

[*] The 2200*l.* was decreed to be paid to the plaintiffs, with interest from the time of its being paid. (5)

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(4) See the cases and references in note (1), *ante*, and the note to *Evelyn v. Evelyn*, 2 Cox, P. W. 664.

(5) The decree directed interest to be computed on the 2405*l.* 10*s.* 6*d.*, from the 1st of December, 1761, at 4*l.* per cent.; and, by consent, it was ordered that the defendants, *T. W.*, and *Ann* his wife, and *W. B.*, should, out of what might be found due for the said sum of 2405*l.* 10*s.* 6*d.*, and interest, pay unto the legatees what should be certified as remaining due to them for their legacies. R. L.

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CRAIG against BOLTON.

(No Entry.)

Security for costs [not granted after any step taken by defendant. (1)]

MR. Stratford moved, on a former day, that the plaintiff, living in Ireland, (which appeared on the face of the bill) might give security for costs. The application was after answer put in.

A case of *Meliorucchy v. Meliorucchy*, 2 Vesey, 24, was then mentioned by the Register, where answering or applying for time was held to be a waiver of the security for costs.

The motion stood over, and Mr. Stratford now renewed it, contending that it was only a waiver of the costs then incurred, not of future costs: he cited *Goodwin v. Archer*, 1 Eq. Ab. 350. 2 Wms. 452. *Gage v. Lady Stafford*, 2 Vesey, 556.

But Lord Chancellor refused the motion, holding the application, after the answer, to be a second dilatory.

(1) *Vide S. P. Meliorucchy v. Same*, 2 Ves. 24 (above cited). Note to the 4th edition, which refers to *Anon.* 10 Ves. 287, &c. See also *White v. Greathead*, 15 Ves. 2. and *Dyott v. Dyott*, 1 Madd. Rep. 187. where the defendant's answer had been filed by mistake, unknown to him, after he became apprized that the plaintiff was gone abroad. See also the note to 1 Ball and Beatt. 566. Lord Eldon C. alluded to the principal case (14 Dec. 1804), when he said, the practice had been thus settled from analogy to the rule at common law. Editor's MS. note, and S. C. 10 Ves. 287. Previously to the case of *Dyott v. Dyott*, above noticed (1 Madd. Rep. 187.) it was held in *Mason v. Gardiner*, 6th July, 1793, that the defendant would have been entitled to have security for costs after answer, where he had not the least notice at the time of answering, that the plaintiff was out of the jurisdiction, and had been misled by the plaintiff's description of himself; if he, the defendant, had not precluded himself by taking other steps in the cause after such knowledge. The case is amongst Lord Colchester's notes, as communicated to his lordship by Mr. Cor, and is as follows:

A defendant may apply for security for costs, after answer, if he had no notice at the time of answering that the plaintiff was out of the jurisdiction. But if he takes any step in the cause after such notice he waives the security for costs.

" *Chancery, July 6th, 1793. Mason v. Gardiner.*—The plaintiff, in the original bill, was described as late of the *West Indies*, but then of the *City of London*.
 " The defendant answered; but exceptions having been taken to the answer, the defendant submitted to the exceptions, and afterwards filed a cross-bill.
 " The defendant, in the original suit, now applied to the Court that the plaintiff might give security for costs, alleging that, upon application to the plaintiff's solicitor, in the original suit, to appear for the plaintiff to the cross-bill, he discovered, for the first time, that the plaintiff, in the original suit, did not reside in *London*, as he was described, but resided in the north of *Ireland*, and this was supported by an affidavit.
 " And it was argued for the defendant, to the original suit, that although, in general, a defendant was considered as having waived his right to call for any security for costs by answering the bill, yet that such rule ought not to hold in the present case, where the defendant was misled by the false description of the plaintiff in his own bill, and had put in his answer, under an idea that the plaintiff was resident within the jurisdiction of the Court.
 " To this it was answered (and so it appeared) that the defendant had, by his own cross-bill, expressly stated the plaintiff to be resident in *Ireland*; and after that had answered the exceptions to his answer to the original bill; and therefore had certainly taken a step in the cause after he had notice that the plaintiff was out of the jurisdiction.
 " And the Lord Chancellor said, that the defendant had thereby precluded himself from asking for a security for costs, and refused the motion."

It appears clearly from the above that the Lord Chancellor would have made the order since the defendant had not had any knowledge of the fact at the time of filing his answer, if he had not afterwards committed himself; so that the case of *Dyott v. Dyott* should not be led into precedent beyond its exact circumstances.—Editor.

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Ex parte ENGLISH in the Matter of LAWRENCE.

THE testator, who was uncle to the bankrupt, and to whom the bankrupt was indebted 1200*l.* by his will, forgave him 1000*l.* part thereof, if he should pay to his sister 60*l.* a year; but if he should fail in so doing by two months, the executrix was to call in the 1200*l.* the sister to have the interest thereof for her life; and if he should punctually pay the same, then, after the decease of the sister, he was to pay 200*l.* the residue to the executrix. The payments had several times been in arrear, but had been afterwards paid, and the sister's receipts taken for them. The prayer of the petition was to be admitted to prove the 1200*l.* under the commission.

Debt forgiven by the testator, on condition that the bankrupt should pay 60*l.* annually to his sister, upon bankruptcy the executrix shall prove the debt.

Lord Chancellor.—There is no doubt the payments have been unpunctual, and the executrix was to demand the money upon an unpunctual payment. The only question is, whether the receipt of the third person has the same effect as the receipt of an obligee to an obligor. — The executrix must be admitted to prove the 1200*l.*

SETON against SETON.

(No Entry on this occasion.) (1)

CLEMENTINA Stewart, daughter of Sir John Stewart, baronet, intermarried with Alexander Moray, who was possessed of a large fortune, and, at his decease, she became entitled to a large jointure.

A mother gives a promissory note to a trustee for the benefit of a child of

which she is enceint. This is not sufficiently *nudum pactum*, for the Court to allow a demurrer to a bill by the child and the trustee to have it carried into execution.

(1) The notes of Lord Redesdale, (who was of counsel on this occasion,) commence by noticing, that "this seems to be one of those incorrect notes which it is much to be lamented, Mr. Brown thought fit to publish." They there question, "Whether the whole of the case did not finally appear to have been a gross fraud on Clementina Moray;" and observe, that "the effect of it would have been to have left her without provision, and gives the whole property to her illegitimate child, under the influence of the father of that child." And the notes conclude with a memorandum, that "the end of this cause should be enquired after, and especially whether the cross bill was dismissed, or some compromise took place." The editor's diligence was particularly stimulated by the above; and he made a strict research for a period of several years after the occasion in question; but, it is remarkable, that there is not a single Entry of the cause, or cross cause, in the Registrar's books after the above year, 1789; and that in that year there is no material Entry whatsoever; so that it is probable the matter was compromised. The editor finds several Entries of each cause in R. L., as of the above year 1789, which are immaterial, except as tending to elucidate a passage in the last paragraph of Mr. Brown's Report, "that Clementina was admitted to be then the wife of George Seton;" and as concurring to explain Lord Redesdale's observation relative to the father of the child. In some of the Entries the title is Clementina Seton, by Sir J. Stuart, Bart., her next friend, v. George Seton, Esquire, (R. L. 1788. B. fol. 595.) In others Clementina Moray, widow, (R. L. 1788. B. fol. 487. 491. b.) Whilst in another, she is called Clementina Seton, otherwise Moray. (Ibid. 425. b.) It must be noticed that the editor has directed his enquiries during the period of several years under the titles "Moray," and "Stuart," as well as "Seton," without effect.

Clementina,

1789.

Seton
against
Seton.
[*611]

Clementina, after the decease of her husband, being enceint of a child, (one of the plaintiffs) who would otherwise be unprovided for, entered into a contract with *Charles Moray*, the brother of her [*] late husband, for the sale of her jointure for 9500*l.* and, before the contract was completed, in order to make a provision for the child, of which she was so enceint, entered into a note as follows: "*Edinburgh, January 28th, 1788. Three months after date, I promise to pay to John Hore, or bearer, the sum of 9500*l.* sterling, value received* (2) by me, *Clementina Moray.*" And, after she had delivered the same to *George Seton* (the other plaintiff) he endorsed thereon the following declaration of trust. "The within bill for 9500*l.* was signed and given to me by *Mrs. Moray*, as a provision for the child of which she was pregnant, and my name is made use of as a trustee, only for such child (3), witness my hand, *George Seton.* The contract with *Mr. Moray* being carried into execution the money was paid into the hands of — *Walker*, to be invested on the trusts. *Clementina Moray*, afterwards, together with her father, filed her bill, without making the other plaintiff (the child of whom she had been enceint, but who was then born) a party, against *George Seton*, to compel him to deliver up the note as fraudulent. *Alexander Seton*, the child, by *George Seton*, as his next friend, and *George Seton* in his own right, filed this cross bill, praying that the agreement entered into by the note, and the declaration of trust might be established, and the money called in, and invested in the purchase of government securities upon the trusts; and that the funds in which it should be invested, upon the death of *Clementina Moray* (4), might be subject to the trust for the child.

To this cross bill, *Clementina* put in a general demurrer for want of equity.

Mr. Scott and *Mr. Mitford*, in support of the demurrer, insisted that the plaintiffs, in this bill, being mere volunteers, had no remedy in this court, but might bring an action at law upon the note.

Lord Chancellor thought the bill improperly arranged as to the parties, that the child should have appeared by some other *prochein ami*, and the action at law ought to be brought by the child, against the plaintiff *George Seton*, and *Clementina*, (who was admitted now to be the wife of *George Seton*) (5) as her debt before marriage; but said he could not undertake to say, that a promissory note given by a woman to a trustee for her [*] child, was *nudum pactum*; and that, where a *cestui qui trust* is a joint plaintiff with the trustee, in a bill on such a subject, he could not dismiss the bill against the *cestui qui trust*.

Demurrer over-ruled.

(2) Lord Redesdale's notes here observe, "that no value was paid."

(3) Lord Redesdale here notices, "that no provision appears reserved for *Clementina*." The editor conceives, this applies materially to that part of the prayer of the Bill above stated, and referred to note (4), where it desires the fund to be applied for the benefit of the child, upon the death (alone) of *Clementina Moray*. This report, therefore, must be singularly inaccurate.

(4) See the preceding note. Lord Redesdale observes, there was nothing of the kind in the security.

(5) Lord Redesdale's notes, enquire how this could be! See at the latter end of note (1), *antea*.

[*612]

1789.

HILL against CHAPMAN.

(Reg Lib. 1788. A. fol. 445. b.)

JOHN CHAPMAN, by will, the 15th of January, 1785, appointed Chapman one of his executors, (to whom he gave legacies of 50*l.* each,) who also claimed one hundred pounds, under the circumstances disclosed by his examination, and reported by the Master, and by him submitted to the Court.

That Chapman had been employed in the general concerns of the testator, and particularly in the receipt of his rents, for which he received a salary of 20*l.* a-year, which the testator had frequently acknowledged was inadequate to the trouble: That in the latter end of the year 1779, the testator delivered to him a will of his, (the testator's,) to keep, purporting to bear date the 16th of April, 1779, and of which he was appointed one of the executors, and that by such will the testator gave each of his executors 30*l.*: That the testator, at the time he delivered the said will, to the said Edward Chapman, told him, there was something in it for himself, that would reward him for the trouble he the said testator had often given him, and for the extra-trouble he would have in the execution of his said will, more than his other executors, he knew his affairs so well: That with the will so delivered, there was pinned a piece of paper, or note, directed to Mr. Edward Chapman, in which was inclosed a bank note value 50*l.*: That the testator, frequently afterwards, had the will, with the paper pinned thereto, and the contents, returned to him, and as often again delivered the will and paper to the said Chapman: That at the time he last delivered the said will to the said Chapman, which was in November, 1784, he said he thought he had not done enough for him; and added, that he had doubled what was in the paper; and that some time afterwards the testator said to him, the defendant Chapman, "Now I have made another [*] will, the old will is of no use to me, but you must take care of it, by reason, you know, there is something with it for yourself: as soon as I am dead, open the paper and take it out;" and added, "that he gave it him in that manner to prevent his daughter knowing how much he gave him:" That at the last time the testator re-delivered his said will to him, there was pinned to it a piece of paper directed, "For Mr. Chapman, the 8th of November, 1784," and therein were contained two bank notes of 50*l.* each. The Master also further found, that the testator, by his will, the 15th of January, 1785, gave to his executors 50*l.* each, and also to the said Edward Chapman 10*l.* for mourning.

Mr. Finch, for Chapman, — argued, that, under all the circumstances of the case, this gift to Chapman was a *donatio mortis causâ*: that though the paper was not entitled as a testamentary paper, yet, being delivered in the life-time of the party, was good. A *donatio mortis causâ* is always a gift in the life-time, it needs no assent of the executor, nor is it proveable in the ecclesiastical court; neither is it necessary it should be *in extremis*. This appears from the following cases; *Ashton v. Dawson*, Sel. Ca. in Chanc. 14. was a gift in case the testator should die of that illness. *Drury v. Smith*, 1 P. Wms. 404. *Snelgrove v. Bailey*, 3 Atk. 214. citing Pre. Ch.

Donatio mortis causâ. (1)

Trinkets of small value directed to be delivered to the father of infant plaintiffs.

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(1) As to this subject, see 1 Roper on Legacies, 1, 2, &c. especially *Ward v. Turner*, 2 Ves. 431. *Snelgrove v. Bailey*, 3 Atk. 214. *Brown v. Burrow*, post. 4 vol. 72. *Tate v. Hibbert*, *ibid.* 286, and 2 Ves. jun. 111. Et vide, *Gardner v. Parker*, 3 Madd. Rep. 184. As to Gifts *inter vivos*, See *Antrobus v. Smith*, 12 Ves. 39, &c. *Powel v. Cleaver*, ante, 500, &c. *Tomkyns v. Ladbroke*, 2 Ves. 591. Et per Lord Eldon C., in *Lewis v. Maddocks*, 3 Ves. 154, &c.

1789.

HILL
against
CHAPMAN.

300. *Ward v. Turner*, 2 Vesey, 431., which recognises the doctrine as to donations *mortis causâ*, although the delivery of the receipts, in that case, was held insufficient. Here the gift in the life-time was complete; the defendant is, therefore, intitled to retain the two fifty pound notes.

Mr. *Daniel*, for the plaintiff. — This is a gift before the making of the will; therefore, the testator, if he meant the notes to pass, could have given them as a legacy; and it only appears from the evidence of *Chapman*.

Lord Chancellor. — Being reported by the Master, I think the gift good, as a *donatio causâ mortis*.

The Court also ordered a gold watch and some other trinkets, specifically given to some of the plaintiffs, who where infants, to be delivered, by the executors, to their father.

[*] HUGHES against DOULBEN.

(Reg. Lib. 1788. A. fol. 685. Entered *Hughes v. Owens*.)

[*614]

[S. C. 2 Cox,
Ca. Ch. 170.
Quod vide.]

[On petition of
re-hearing and
exceptions.]
If a devise for
payment of
debts does not
provide for it in
a practicable
manner, it does
not take the case
out of the
statute of
fraudulent
devises. (1)

THE testator made a general charge of his debts, upon his real estate, exempting his personalty from the payment thereof. He then devised a particular estate to trustees for that purpose, "*excepting his capital mansion house*." The decree (2) was, that the devised trust estate should be sold for the payment of debts. The Master sold the whole devised trust estate, not excepting the mansion house, and upon its being referred to the Master to consider whether a good title could be made, he reported, there could not be a good title made to the mansion house. On an exception to the Master's report,

Mr. *Lloyd* cited *Lingard v. Lord Derby*, *ante*, vol. i. p. 311. and *Ridout v. Lord Plymouth*, 2 Atk. 104., to show that a devise for payment of debts, though out of rents and profits only, took the case out of the statute of fraudulent devises, and that a creditor, even by specialty, could only take it in the way in which the testator thought proper to give

(1) Mr. Cox's Report (2 vol. 170.) contains a good note of Lord *Thurlow*'s judgment, who referred to *Lingard v. Earl of Derby*, *ante*, 1 vol. 311, &c., in which case the Editor has quoted the material part of the judgment at length.

(2) The suit was instituted by the testator's creditors for the usual purposes. The original decree, dated 27th June, 1777, was, in the usual terms, generally "that what should be found due to the creditors of the testator should be raised, by sale or mortgage, of the testator's real estates, or a sufficient part thereof, &c.," and not in the terms above stated.

By another decretal order, dated 22d December, 1783, made on the petition of the plaintiffs, it was directed, "that the devised trust estates, mentioned in the testator's will, should be forthwith sold," &c.

The Court, on another application, directed an inquiry as to whether a good title could be made to the said estates.

The Master's Report stated, that an objection was taken before him on behalf of Sir *E. Lloyd*, who had contracted for the purchase of the said estates, for that he, the Master, was not warranted by the will in selling all the said estates, and that he ought only to have sold the devised estates, and not the mansion house, &c. the same being expressly excepted by the will; so that Sir *E. L.* insisted a good title could not be made as to such excepted premises. It then certified the Master's opinion, that a good title could not be made to such excepted part of the estates; inasmuch as the premises excepted in the will constituted a part of the estate mentioned as having been purchased by Sir *E. L.* and as such estate was purchased in one lot. Sir *Samuel Lloyd* took exceptions to this report, insisting that a good title could be made to the excepted premises, and the plaintiffs presented a petition of re-hearing, insisting that in case the money arising by sale of the estates devised to be sold should be insufficient for payment of the debts, &c. the deficiency should be made good by mortgage, [or sale] of a sufficient part of the testator's real estate not devised to be sold. R. L.

The decree was varied as in note (4).

it him; though, had there been no devise to pay debts, he would have had a right to have his debt raised by sale.

Lord Chancellor (3) said, *he was not aware that a gift of the estate, for the payment of debts, in a manner which would not answer the purpose, was such a devise as would take the case out of the statute.* That if the Master reported that *the debts could not be paid by the means provided in the devise, he should either here, or in the House of Lords, (unless the house over-ruled him,) order the estate to be sold, notwithstanding the statute; and should consider it, so far, as fraudulent.*

In the present case, he should order the devised estate to be sold, without including the capital mansion house, if, without it, the estate was sufficient for payment of the debts, (4) if not the mansion house must be sold.

But it being understood that it was sufficient without the mansion house, the order went so. (4)

And the exception was over-ruled. (4)

(3) See the references in note (1).

(4) The order made upon the exceptions and petitions of re-hearing was, that the said [original] decree [of the 27th June, 1777,] so far as it directed, that what should be found due for the testator's debts, should be raised by sale or mortgage of the testator's real estate, or a sufficient part thereof, and the order of the 22d December, 1783, so far as it "directed, the devised trust estates mentioned in the testator's will and in the decree should "be forthwith sold," be varied, and instead thereof, it was ordered that the testator's estates devised by his will, *except his mansion house, &c.* be sold with the approbation of the Master, &c. &c. The deposit made by the exceptant was to be returned, and the deposit made on the petition of re-hearing was to be repaid to the plaintiffs. R. L.

1789.

HUGHES
against
DOULDER.

[*] *Ex parte* HARRISON, in the Matter of LEWIS and POTTER. (1)

[S. C. 2 Cox,
172.]

THIS case arose on an engagement, by *Lewis and Potter*, to warrant the payment of the bill of exchange in question, in like manner as if they had indorsed it. This engagement was in writing, but the bill did not become due till after the bankruptcy of *Lewis and Potter*.

Lord Chancellor said, Certainly a party may warrant the payment of a bill of exchange, by other means than by endorsing it; but, in order to enable the holder to prove his debt under the statute of rebate, 7 Geo. 1. he must make himself a creditor by indorsement, there is no debt proveable under the provision of that statute, but what arises upon the face of the instrument.

An engagement to warrant the payment of a bill of exchange (otherwise than by endorsement) will not enable the holder to prove it under a commission of bankruptcy. (2)

Therefore, refused to order proof of the debt.

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(1) This report is copied from Mr. Cox's note.

(2) See also *Ex parte* Minchin, in re Barrington, 2 Scho. & Lefroy, 112. It must, however, be noticed, that a promise to accept a bill is at law the same as an actual acceptance; and that the amount is proveable under a commission of bankrupt. *Pillans v. Van Meppel*, 3 Burr. 1663, 1674, and Exp. Dyer, 6 Ves. 9.

LIEUTAND against AGASSIZ.

(No entry.)

JAMES LIEUTAND made his will, 14th March, 1771, and, after directing the payment of his debts, and funeral expences, gave as follows to his children, to whom he shall leave, before or after his death, such part of testator's inheritance as their conduct may deserve: but if at the death of his brother there should be no children, then to A; this is an executory devise, which, if it took place, would defeat the interest of the children of the brother.

Gift to testator's brother, without any restriction

F f 2

lows:

1789.

LIEUTAND
against
AGASSIZ.

[*616]

lows: "As to all the rest and residue of my estate and effects, whether real or personal, I give the free enjoyment thereof to my brother, *Francis Lieutand*, of *Geneva*, whom I constitute my sole and universal heir, and without any restriction as to his children, to whom he shall leave, before or after his death, such part of my inheritance as their conduct may deserve: but if at the death of my brother *Francis Lieutand*, there shall be no children left alive, and that all his children shall be dead without issue, in such case I give, bequeath, and leave the said residue to Mr. *William Arabin*, or, in default of him, to his children, in equal shares," and appointed *Collombier*, and the defendant, *Agassiz*, executors. — The testator died in *May*, 1771. The executors proved the will in 1772; *Collombier* died. The surviving executor, *Agassiz*, invested part of the testator's personal estate in bank stock, in the name of himself, and of the plaintiff, *Francis Lieutand*. The plaintiff *Francis*, by deed poll, [*] dated 10th *August*, 1786, directed *Agassiz*, to join in a transfer of the stock, to the other plaintiff, *Mark*, his son, which was also the prayer of the bill.

A daughter, the only other child of the plaintiff *Francis*, and *William Arabin*, consented to the transfer; but the latter having a daughter, who was a minor, the surviving executor refused to transfer, without taking the opinion of the Court on her interest.

Mr. *Mansfield*, in support of the bill, contended, that the disposition made by the plaintiff *Francis*, in favour of the plaintiff, *Mark*, ought to be established, and that the meaning of the will was, if *Francis* should die without issue, and without making any disposition, then it should go over to *Arabin*; otherwise, it would defeat the power.

Lord *Chancellor* thought the gift over was an executory devise, and, if it took place, would defeat the interest of the children, but ordered the cause to stand over.

It was suggested, that the remainder over to Mr. *Arabin* vested at the death of the testator, and that he, then having no issue, was absolutely in him.

On the cause coming on again in *Trinity* term, Mr. *Mansfield* gave it up, and

The bill was dismissed.

FO[R]STER against FO[R]STER. [27th June.]

(Reg. Lib. 1788. A. fol. 548. b.)

Admission of
assets to answer
rents by the
executor of a
receiver, makes
him liable to
interest, if
made. (1)

THIS was a petition of rehearing, by *Gilbert Alder*, executor of *Daniel Alder*, the late receiver of the estate of the family of *Foster*.

Several bills had been filed, and other proceedings had relative to the estates of the family of *Foster*, of which the late *Daniel Alder* had been steward, in the time of the late and present possessors; in the course of which, *Daniel Alder*, by decree of 11th *July*, 1774, had been appointed receiver, and had passed his accounts down to 1779, when there was a balance in his hands [*] of 5000*l.* and upwards; and, at the time of his death, there was due to the estate, not only the aforesaid balance, but also such further sums as were afterwards received, in respect of the said rents, and, in 1785, *Daniel Alder* died, having appointed a person, since deceased, and the petitioner, his executors.

The plaintiffs, by a supplemental bill filed in *Trinity* vacation, 1787, against petitioner, prayed among other things, an account of the money

(1) *Vide etiam Horsley v. Chaloner*, 2 Ves. 83, 85, of note (4) *postea*.

due from the said *Daniel Alder*, at the time of his death, in respect of the rents received by him from 1779, to the time of his death, and that the defendant might pay the same, together with the 5000*l.* the balance of his former account, into the bank, and, in case the defendant did not admit assets, then for an account of the personal estate of *Alder*.

To this bill, the executor of *Alder* put in an answer, admitting, that on the settling of the receiver, his testator's accounts, in 1779, there was a balance of 5000*l.* due from him, as stated in the bill, and expressed his belief, that his testator had made up his accounts for the year 1780, and 1781, and that the same were carried into the Master's office, and proceeded on, but that objections had been taken to sundry payments made by the said *Daniel Alder*, (which appeared to be a balance of 4500*l.* upon accounts settled with the plaintiff's father, tenant in tail of the estates, just before he came of age,) the passing of the accounts was thereby delayed, and that the said *Daniel Alder* intended to have applied to the court to have such payments allowed, in order to have his subsequent accounts finally passed, but was prevented by his death from so doing, the benefit of which payments the executor claimed, and, in a schedule to his answer, set forth an account of the sums of money received, paid, allowed, and retained by his testator, the said *Daniel Alder*, by and out of the rents of the said estates, from 1779 to his death, and "admitted assets of the said *Daniel Alder*, sufficient to answer what was due from the said *Daniel Alder*, with regard to such rents."

The supplemental bill was afterwards, by order, amended in several particulars, and especially by a charge "that the said *Daniel Alder* had made great interest of the money received by him, on account of the rents and profits," and by a prayer, that, in the account to be taken of rents received from 1779, his estate[*] might be charged with interest for the same, and also upon the rents received previous to that time.

The executor was not called upon to answer the amended bill; but had a notice, that no answer was required from him;—and, no answer being put in, the cause was brought on to hearing. Intermediate orders having been made, under which the executor had paid in 5000*l.* the balance of the account passed by his testator, in his life-time, and 1117*l.* the balance appearing by the schedule of defendant's answer to be in his hands, over and above the said 5000*l.*

Upon the hearing of the cause 3d *July* last, a decree was made, whereby it was ordered, *inter alia*, that the Master should inquire and state what balance the said *Daniel Alder* had in his hands at the end of each year, from *July* 1774 to 1779, and the consideration of interest was to be reserved, and that the Master should compute interest at 4*l.* per cent. per ann. from the 23d *November*, 1781, on the sum of 5352*l.*, the balance then reported due from him, to the 15th *November*, 1788, the time he paid 5000*l.* part thereof into the bank, and should likewise compute interest, at the like rate, on the balances he should each year find in his hands, after the 1st day of *May*, 1779, and that the defendant should pass such of the accounts of the testator as had not been passed: and upon the ground of the defendant's admitting assets it was ordered that the defendant should pay what should be found due, and also such interest as the estate of *Daniel Alder* should be charged with, under the direction, and that the defendant should pay costs, as far as related to the said *Daniel Alder*.

The defendant, therefore, by his petition of rehearing, insisted that the decree, as far as respects the computation of interest on the rents received by his testator, and the payment thereof by the petitioner, ought to be reversed, because the plaintiff, by the supplemental bill, did not claim any interest, or charged that the defendant's testator made any interest, or any wilful delay or negligence in not sooner passing his

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accounts:

1789.

FOSTER
against
FOSTER.

[*618]

1789.

FOSTER
against
FOSTER.
[*619]

accounts: and that the decree was erroneous in directing the payment of such interest, by the defendant, as executor of the said *Daniel Alder*, on a supposed admission of assets, to the extent of the interest to be computed on the rents, whereas the defendant had only admitted [*] assets to pay the net rents received by the said *Daniel Alder*, after being allowed the sums particularised in defendant's answer (2), and therefore prayed that the decree might be varied in those respects.

Mr. *Graham* and Mr. *Richards*, in support of the petition, said, that to charge a receiver with interest, it must appear either that he made interest of the money in his hands, or that there was gross negligence in not making interest, which he might have made of it. That here the party was taken by surprise, the bill not praying any interest, and notice being given that no answer was necessary to the amended bill. The admission of assets, to answer the rents charged in the former bill could not be extended to assets to answer interest charged by the amended bill. It ought therefore, to be referred to the Master, to inquire whether any, and what interest was actually made.

But Lord *Chancellor* thought, that in this case there was no surprise, for that wherever a bill was amended, though the defendant need not put in an answer, he may do so, if his interest is affected. An admission of assets to pay the testator's debts, is the largest admission. An admission of assets of a receiver, obliges the executor to see whether he has money to answer the rents, [and the] interest made of them. (3) A receiver should not keep the money produced by the rents in his hands. He should move to have it laid out. His being, in this case, the confidential servant of the family, called for the greater care.

Where there has been a surprise (4), the Court, on great inquiry†, has admitted an answer to be amended (5), but on a rehearing of a decree, it cannot be done, but by the consent of the other side.

Decree affirmed.

† See *Mitford's Pleadings in Chancery*, 260. and the cases there referred to, particularly 2 Wms. 427, and the order, as stated by Mr. *Cor*, in his note. The Reporter has seen a MSS. case of *Dagley v. Crump*, Trin. 1719, where the defendant, after a general admission of assets, was permitted to amend her answer, by admitting assets to pay the plaintiff's debt, if the same did not exceed 400l.

(2) The petitioner denied he had received assets to answer such interest, and submitted that under the circumstances there should have been at least an inquiry directed as to whether *D. A.* had made any, and what interest of the rents in question received by him, or whether he had been guilty of any, and what delay or negligence in passing his accounts relative to such rents; and that an account should have been directed of the sums paid by him, and objected to in the accounts taken in to the Master's office subsequent to the year 1779. R. L.

(3) See *Hicks v. Hicks*, 3 Atk. 274. *Fletcher v. Dod*, 1 Ves. jun. 85. — *v. Jolland*, 8 Ves. 72. Vide *ibid.* 371. *Wren v. Keyton*, 11 Ves. 377.

(4) In *Horseley v. Chaloner*, 2 Ves. 85. (*cit. supra.*) The M. R. says, "It is true, on circumstances, the Court will not pin down an executor to an admission of assets; as if the money is in a banker's hands, the best bank in England may fail, and that undoubtedly will not bind him. But he must make a case for it if he will get over so strong an admission; he must prove that mistake, and that the circumstance on which he built his admission failed."

(5) Lord *Thurlow* afterwards improved the practice in such respects, by permitting the parties to file a supplemental answer, instead of amending the original record. See the Editor's note to *Verney v. M'Namara*, *antea*, 1 vol. 419. and Mr. *Beames's* note to *Livesey v. Wilson*, 1 Ves. & Beames, 150. *Strange v. Collins*, 2 Ves. & Beames, 163. *Edwards v. M'Leay*, *ibid.* 256. *White v. Godbold*, 1 Madd. R. 269, &c., upon amendment of Answers generally.

1789.

CURTIS against CURTIS.

DAY against LEMAN.

(Reg. Lib. 1788. A. fol. 540.)

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IN November, 1767, *Elizabeth Curtis*, the plaintiff in the first cause, filed her bill against the defendant, *Thomas Curtis*, and the other defendants in that cause, setting forth (3) (*inter alia*) that *Paul Downton Curtis*, the plaintiff's husband, died in *July*, 1765, without issue, leaving the said plaintiff his wife, and the defendant *Thomas Curtis*, his brother and heir at law; and that the said *Paul Downton Curtis* was, at his death, seised, in fee simple, or fee tail of several estates therein described; and that the said *Thomas Curtis*, as heir at law, or devisee of the said *Paul Downton Curtis*, had taken possession of his freehold estates, although, as plaintiff insisted, she became entitled to her dower therein; and therefore praying an account of one-third of the rents, since the decease of *Paul Downton Curtis*, and to be let into possession of one-third of the freehold, and decreed to hold the same for life. The defendant, by his answer to this bill, insisted that the plaintiff was never married to the deceased, and therefore that she was not dowable. The cause coming on to be heard the 15th of *May*, 1778 (3), before Lord Chancellor *Bathurst*, his Lordship ordered the bill to be retained for twelve months, with liberty to the plaintiff to bring her action at law, to try her right to dower; and, in case she should do so, the consideration of costs, and further directions were reserved till the Master should have made his report; but, in case she should not proceed to trial, the bill, as far as it prayed relief as to dower, was to stand dismissed. The plaintiff sued out a writ of dower against the defendant, to which he pleaded; but, before issue was joined, the defendant died the 16th of *February*, 1779, having made his will, and thereby devised to defendant *James Leman*, and other trustees, all his freehold estates, to the use of *Susannah* his wife for life, with remainder to the defendant, *Thomas Leman*, for life, with remainder to his first and other sons, with several remainders over, and appointed the defendant *Thomas Leman* residuary legatee, and his said wife executrix of his said will. The plaintiff *Elizabeth* sued out another writ of dower, and on the 6th of *November*, 1779, exhibited her bill of revivor against *Susannah*, the devisee for life, (without making[*]) the de-

Bill filed by a widow, against the heir of her husband, for dower: the bill was ordered to be retained for a year, to try her right (1) and writ of dower brought. Before issue joined, the heir died: Then the widow's right established, at law, against his devise: the widow dying, her representatives filed a bill of revivor and supplement against the executor and devisee of the heir, for the third part of the means profits, to the death of the widow; which was decreed, and that decree affirmed on re-hearing. (2)

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(1) So likewise in *Read v. Read*, 15th December, 1744, stated in Lord *Redesdale's* T. (3d edit.) 111, &c.

(2) The point was certainly once much questioned; but it has been long quite settled, (and the present instance is but confirmatory) that the Courts of Equity entertain a concurrent immediate jurisdiction in cases of dower, with much greater advantage to the party, where her right to dower is not disputed, and that even where the right is disputed, they will afford every facility for a trial at law of the precise question of right; which, if established, they will follow up by their ultimate decree for an assignment, and for arrears which the widow could never recover under her writ at common law. See the judgment in the principal case. Lord *Redesdale's* Tr. 109, 110, 111, &c. (3d edit.) Per Lord *Hardwicke* in *Dormer v. Fortescue*, 3 Atk. 130, 131. *Moor v. Black*, Forr. 126. *Mundy v. Mundy*, 2 Ves. jun. 122, 128, &c.

It is observable, that Lord *Hardwicke* in *Graham v. Graham*, 1 Ves. 262. so favoured the admitted right of dower that in taking general accounts, his Lordship not only directed the widow to be allowed the arrears of her dower, but decreed her dower to be paid in future; although in the case of a trade, the Court after making a decree for specific performance of articles to let the plaintiff into co-partnership, refused to direct an account of the profits justly due under the articles, and left the party to recover them at law. Anon. 2 Ves. 629, 630.

(3) Reg. Lib. 1777. A. fol. 623, &c.

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fendant, *Thomas Leman*, a party to that bill,) and, having caused a declaration to be delivered, *Susannah Curtis* pleaded thereto; 1st, that *Elizabeth* was never lawfully accoupled to the said *Paul Downton Curtis*. 2dly, that *Paul Downton Curtis* was not seised, during the marriage, of such estate whereof he could endow the said *Elizabeth*; to which plea *Elizabeth* replied, that she was accoupled to the said *Paul Downton Curtis* in lawful matrimony; whereupon a writ was issued from the Court of Common Pleas to the Bishop of *Bath and Wells*, who certified the marriage, and in *Hilary* term, 1781, an issue was made up on the second plea, and plaintiff *Elizabeth* obtained a verdict thereon. *Susannah*, the defendant, died 6th *October*, 1782, having appointed her niece, *Frances Hamilton*, executrix of her will. Plaintiff *Elizabeth* died 6th *October*, 1782, having made her will, and appointed the plaintiff *Day* sole executor thereof, who proved the same, and on the 21st *May*, 1783, filed his bill of revivor and supplement against the present defendant, the devisee of *Thomas Curtis*, and his personal representative, who was also personal representative of *Paul Downton Curtis*, and others, stating the above facts, and that, upon the death of *Susannah*, the defendant, *Thomas Leman*, became entitled to, and took possession of, the estate of *Paul Downton Curtis*, out of which said *Elizabeth* had recovered her dower, and ought to answer for such dower from the death of *Paul Downton Curtis*, and that administration *de bonis non*, with the will annexed, of *Paul Downton Curtis*, and of *Thomas Curtis*, had been granted to defendant *James Leman*, (father of defendant *Thomas Leman*), by which he became their personal representative. By decree, on the hearing of this supplemental cause, before his Honor, the late Master of the Rolls, 13th *December*, 1785, it was ordered, that the former decree should be carried into execution, and the accounts thereby ordered should be prosecuted, and that an account should be taken of the rents and profits of the freehold estate of *Paul Downton Curtis*, come to the hands of *Thomas Curtis* and of *Susannah Curtis*, in their life-time, and of the defendant *James Leman*, as guardian of defendant *Thomas Leman*, down to the death of *Elizabeth Curtis*, to be answered by their respective representatives; and his Honor declared, that plaintiff, *Day*, as executor of *Elizabeth Curtis*, would be entitled to one-third part of what would be coming due on such account. The defendants, *Thomas Leman*, and *James Leman*, presented their petition to have this cause reheard, stating themselves to be aggrieved by so much of the [*] decree as directed, that the former decree of 15th *May*, 1778, should be carried into execution against the said *Thomas Leman*, as devisee and residuary legatee, and defendant *James Leman*, as personal representative of *Thomas Curtis*, as far as that decree relates to the dower of said *Elizabeth Curtis*, and, also, so much of the said last decree, as directs the account of the rents and profits of the estates of *Paul Downton Curtis*, come to the hands of *Thomas Curtis*, in his life-time, and of defendant *James Leman*, as guardian to defendant *Thomas Leman*, since his decease, down to the death of *Elizabeth Curtis*, and which declared the plaintiff *Day* to be entitled to one-third of what would be due on such account, the petitioners being advised that the said *Thomas Curtis* died before any damages were assessed against him in any writ of dower, or any judgment had been obtained against him in such suit, and that there was no impediment to the said *Elizabeth's* proceeding at law upon such writ, and damages, in an action of dower, are a recompence for an injury in the nature of a trespass, and therefore the same ceased, upon the death of the said *Thomas Curtis*, and his personal representative was not answerable for the same, nor could any action at common law have been brought for the same, and such damages are founded only on the

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statute 20 Hen. 3. commonly called the statute of Merton, by which damages are only given against such as are convicted of forfeiture of dower, and therefore said supplemental bill, as far as it related to the claim of damages, for dower, of the said *Elizabeth Curtis*, in the lifetime of *Thomas Curtis*, ought to have been dismissed with costs; and also in regard that defendant, *Thomas Leman*, was no party to the suit before or at the time of the trial of the issue in said writ of dower, and therefore was not bound thereby, and that the petitioners were not made parties to the suit until after the death of *Elizabeth*, when no writ of dower could have been brought against the defendant, *Thomas Leman*, and said *Elizabeth* did not procure execution of the judgment in the said writ of dower, brought by her against said *Susannah Curtis*, and never was put into possession of the third part of the tenements for which she brought such writ as aforesaid; as she might have been if she had used due diligence; and that petitioners are advised, that said *Elizabeth* was not entitled to dower, in regard *Paul Downton Curtis* had not the legal estate in the premises, and that the verdict was obtained by the consent of *Susannah*, that therefore the title of *Elizabeth* should have been established at law, in an action to which the defendant *Thomas Leman* was a party, [*] that, therefore, the supplemental bill ought to have been dismissed with costs, against the petitioner *Thomas Leman*, and against the petitioner *James Leman*, as guardian of his son, or as personal representative of *Thomas Curtis*.

This cause came on to be reheard 27th May, 1789.

Mr. Mitford (4) and Mr. Cox in support of the petition.

The objections taken by the petition of re-hearing, are to two points in the proceedings, first, as to the decree of the account for dower, from the death of the husband to that of *Thomas Curtis*. Second, as to the dower from thence to the death of *Elizabeth*. The important part of the question is, whether the representative of the dowress has a right to come against the representative of *Thomas*, for an account of rents and profits of the estate, during his life; the dowress herself not having recovered at law. The verdict against *Susannah Curtis* cannot bind the estate of *Thomas Curtis*; but, independent of that, it is perfectly clear, that it would be impossible for *Elizabeth Curtis*, were she alive, to recover, now, at law, against the representative of *Thomas*, having lost the remedy at law by her own neglect. (4)

Her husband died in 1765: she did not file her bill till 1767; during that time, she might have brought her writ of dower, and, if she prosecuted it with effect, would have recovered her dower and damages. Her bill did not suggest any impediment to her proceeding at law, she did not bring the cause to a hearing, till 1778. Nothing can excuse that delay. In 1778, she obtained the first decree which determined nothing. After that, *Thomas* died. Upon his death, a new case arose, which a bill of revivor was not sufficient to bring before the Court, she had then lost her remedy at law. The only ground upon which widows have damages in dower, is the statute of *Merton*, Sayer's Law of Damages, 23.; they arise from the forfeiture thereof, for, if she has dower assigned to her in chancery, she shall have no damages, 1 Inst. 33. The demand being at law, the bill should have stated some ground (as a fraud or other impediment to her trying her title at law) for coming into

(4) Lord Redesdale, referring to the rule of law, seems (from his Lordship's MS. notes) to have cited *Mordant v. Thorold*, 1 Salk. 252. 5 Levinz, 375, &c. where tenant in dower having died before writ of enquiry executed, it was held her administration could not bring a *scire facias* for the damages and more profits, but see *postea*, 652. His Lordship's notes also refer to Jenk. 45. pl. 85. where the husband died seised; as likewise to Sny. 470. where the damages were assessed against the terre-tenant, upon the death of the defendant to the action.

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a court of equity. Not having done so, and her remedy at law being gone, a court of equity could not decree the account of rents and profits; for there is no case where [*] a court of equity will decree a right which is gone at law, unless there has been some fraud or concealment, by which the party has been deprived of the legal remedy. So, where a verdict has been obtained in ejectment, and the defendant dies during the action for mesne profits, no such account has been decreed. If there is any fraud, the Court will lay hold of that as giving jurisdiction. In *Dormer v. Fortescue*, 3 Atk. 124. Mr. *Dormer* had recovered at law: but he could not have done so without the assistance of this Court, because there was a term in the way, and all the parts of the settlement were in the hands of the defendant. Though it is asserted in the argument, in that case, that there are cases, where at law a person may not recover rents and profits, yet *this Court* will direct an account; that assertion is the clearest authority against the present case, because it limits it to cases "where the Court has a proper jurisdiction;" and, where the Court has obtained a jurisdiction, undoubtedly, it will not suffer an accident to prevent the recovery. Then comes the only part of that case, on which the plaintiffs can rely, which is that, where Lord *Hardwicke* says, "that where a dowress is entitled to dower, and cannot ascertain the lands, the Court will order her to proceed on a particular part, and reserve the further consideration till after the judgment," but, that is not this case, there was no pretence here, that she could not ascertain the lands. (5) Then Lord *Hardwicke* puts the case of a dowress, prevented from recovery by a term standing in her way, but he expressly says, that if the term were out of the way, and she had no need to come hither, it would have been otherwise. It is clearly, therefore, his opinion, that if she could recover without the aid of this Court, he would not decree dower in this Court. He went on the circumstance of the deeds being in the hands of the defendant, and a term being outstanding. A decree of that kind is founded in conscience, as it is against conscience to withhold the deeds and set up the term, but if the deeds, in that case, had been in the plaintiff's hands, and there had been no term, there would have been no relief in a court of equity. In 2 Vern. 722. *Hutton v. Simpson*, the Court would not decree an account of rents and profits. So *Tilley v. Bridges*, 2 Vern. 519. Pre. Ch. 252. *Duke of Bolton v. Deane*, Pre. Ch. 516. *Lockey v. Lockey*, Pre. Ch. 518. *Townsend v. Ash*, 3 Atk. 340. *Norton v. Frecker*, 1 Atk. 524. where the remedy at law was gone, and the Court of Equity could not relieve, though it was clear the possession was wrongful. Although courts [*] of equity have admitted cases in aid of dowresses, still they have considered the claim as originally a legal claim. *Delver v. Hunter*, Bunb. 57. Upon this ground it was, that in *Lucas v. Calcraft*, (*ante*, vol. i. p. 134.) Lord *Chancellor* held costs not to be due of course, and that, on an assignment of dower, by commission, no costs should be given; in analogy to legal cases of dower. And, as, at law, the dowress could not recover against the representative, the action being dead with the person, 1 Salk. 252. she cannot be entitled to any damages in a court of equity.

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Mr. *Solicitor General* and Mr. *Lloyd* for the plaintiff. — The objections are, that *Thomas Curtis* was dead before dower was recovered, and that, there being no impediment in the way of a trial at law, the personal representative is not liable. Supposing the original decree to be right, the question is, whether it will make any difference, that *Thomas Curtis* is dead. It has been contended, on the other side, that the case, itself,

(5) The bill certainly contained no such charge; nor is the statement attributed to the Counsel in *Mundy v. Mundy*, 2 Ves. jun. 124. with regard to other charges in the bill in question warranted by Reg. Lib. See note (10) *postea*, and Reg. Lib. 1777. A. fol. 623, 624.

made by the bill, is not a case for an account of rents and profits. It is material, therefore, to consider, whether the Court would have carried on an account against *Thomas*, had he been alive. *It is admitted that damages are not recoverable at law against a party who is dead; but there is nothing like justice, in saying that wherever the remedy is gone at law, it is also gone in equity*; for, wherever a wrong is done, which cannot be ascertained by a jury, there is a remedy in a court of equity. In the case of *waste*, there is no remedy at law against any, but the party who committed it, yet in a case in Pr. Wms. (*Bishop of Winchester v. Knight*, 1 Pr. Wms. 406.) an account was decreed against executors. So in the case of not setting out tithes, though the party dies before judgment, and the remedy at law fails, the executor shall account, for equity says, the party has put my money in his pocket, and therefore shall account for it. Suppose an heir-at-law to file a bill, suggesting the defendant to have got into possession, under pretence of being a devisee, and that terms stood in the way of his recovery at law, and the bill retained that the heir might try his title, and the heir recovers and comes back here for an account; would it be endured, that, because the defendant at law was dead, the heir should not have an account? If the bill was properly brought and retained originally, as far as the representatives of *Thomas Curtis* are concerned, the decree is right, for the distinction is this, if you have [*] a right to either legal or equitable relief, and suffer the party to die, you shall not, in the first instance, bring his representative before the Court, but if you begin against the party himself, and he dies, you shall go on against the representative, *Norton v. Frecker*, only determined that point. In *Pincke v. Thorneycroft*, (ante, vol. i. p. 289.) it was insisted the fine made a bar at law, and, therefore, that there could be no relief in equity; that was corrected in the House of Lords; yet there could have been no recovery at law, on account of the fine. Then, the question is whether the bill ought to have been originally retained against *Thomas Curtis*. It never was suggested, at the former hearing, that this bill for dower was improper; because it was perfectly understood to have been the settled practice of the Court to grant commissions to assign dower, where no legal impediment has been proved: nor would it have been tried but for the doubt upon the marriage. Whenever the court have got jurisdiction, against the party who has committed a personal injury, it has never been doubted it might proceed against the executor. The circumstances of *Dormer v. Fortescue*, are not the only ones in which the Court will decree an account. If one eject another from an estate which contains a colliery, and he works the colliery; after the estate is recovered by the lawful owner, this Court will decree an account of the colliery: and, if the defendant should die, that would not prevent the account; in *Norton v. Frecker*, Lord *Hardwicke* would have carried on the account, if the possession had been recovered against *Richard* in his life-time. But the reason given there will not hold in the case of dower; for, in dower the Court will decree an account in aid of the dowress, and seldom sends the party to law, unless there is a doubt as to the marriage. But the question of jurisdiction, with respect to *Thomas Curtis*, is now out of the case, the Court having retained the bill, which has determined that the Court has jurisdiction. This has been decided by Lord Chancellor, in the *Duke of Leeds v. The Corporation of New Radnor*, (ante, p. 518.) the language of the decree is satisfactory, that the Court has jurisdiction, and that the Court sends it to law to satisfy its conscience. The court of law never goes on to judgment, but the parties bring the *postea* to the court of equity, and all further directions are given there. If the party dies before verdict, the remedy fails. If the bill was originally wrong, the defendants ought to have demurred to it. Then with respect to the infant not being a party to

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to the suit. [*] It was not necessary that he should be so, the action must be brought against the tenant for life only, and the plaintiff finding *Susannah*, tenant for life, properly brought his action against her alone. The law has entrusted the tenant of the freehold, with the title of all persons who have subsequent estates: it cannot be sent back now to try whether she is dowable, the verdict having found her so.

Mr. *Mitford* in reply. — The verdict cannot bind the infant, who was not a party to it. No real action can be maintained against a mere tenant for life; he may pray in aid of the tenant in tail, who, otherwise, could avoid it, or the tenant in tail should have been a party to the bill of revivor, which should have been a bill of revivor and supplement; or the court might have ordered that the infant should attend by his counsel; but, nothing of that sort having been done, the infant is not bound; there being no execution, there is nothing to affect him, the judgment being a nullity as against him. — As to retaining the bill, the effect of so doing is not to give any jurisdiction. (6) Where no particular relief is given by the Court, the mere effect is, that the cause stands over till the party has tried his title at law: if he succeeds at law, he has the full effect of his suit (7); if he is turned round by any unexpected circumstance, he comes back here. If the plaintiff fails, the defendant comes back. The case of *Geast v. Barber*, (*ante*, 61.) shows Lord *Kenyon* did not think that retaining the bill decided the jurisdiction. The first decree, therefore, by the retainer, has determined nothing, but that the Court would not deprive her of the aid of a court of equity, if it should turn out to be necessary; but it would not give an equitable right, where such right did not exist before. Upon the death of *Thomas Curtis*, a new question arose, whether there was any remedy in equity, the remedy at law being gone. No case can be found where, a judgment having been obtained in ejectment, and the defendant being dead, the Court has decreed an account of rents and profits. Lord *Hardwicke* says, expressly, that if there is no term standing in her way, a dowress shall not have an account of rents and profits. If the difficulties which stand in her way are not proved, as well as suggested, the mere suggestion of them will not give the Court jurisdiction. It is said, that in *Pincke v. Thornycroft*, the House of Lords thought the Court could relieve against a fine running. The only ground on which that case can be supported, is, that the heir-at-law [*] came fairly into a Court of equity, for a discovery of what was necessary to prove his title; in which case the Court would not suffer the fine which had run to be set up against him. It is said, that in *Norton v. Frecker*, the distinction was taken with respect to commencing the suit during the life-time of the party; but there is nothing in that case to support the position that there is a remedy against the representative. There is no judgment, in this case, against *Thomas Curtis*; he has, therefore, not been convicted of being a deforciant under the statute of *Merton*. The consequence is, that the widow could not recover any damages; *Lucas v. Calcraft*. (8) If there be not a legal right to dower, there can be no equitable right. The principle on which it has been held that there can be no dower of a trust-estate is, that it is a mere legal right. It is contended, that if the suit was right against *Thomas Curtis*, it is so against his representative: but this is not so, for there was a legal claim against him, but no such against his representative. It is not pretended, by the supplemental bill, that he delayed the trial at law; the delay was altogether on the part of the woman. There is no

(6) See *Geast v. Barber*, *ante* 61., with the Editor's notes, and *Harwood v. Oglander*, 6 Ves. 225.

(7) But a plaintiff for dower has not the full effect of her suit upon a mere establishment of her right at common law. *Vide* the judgment *postea*, and the references *in note* (1) *ante*.

(8) *Antea*, 1 vol. 131., 2 Dick. 594., and 1 Ves. & Beanes; 20. note, S. C.

case before the Court on which it could found the decree, which, if wrong against the representative, is still more so against the infant. There has been no proceeding to bind his title. If there had been an execution of the judgment, he might get free from that execution, but there has not, even, been any judgment against him.

Master of the *Rolls*. — If Mr. *Lloyd* be right in his doctrine, that it is not competent to me to decide, at all, whilst the first decree stands, there is an end of the matter; but I rather believe he lays it down too strongly; for it goes to this, that, even, if it had been set down before my Lord *Chancellor*, he could not have dismissed the bill after the verdict at law, without rehearing the first decree; but I dare say *many bills* have been dismissed under similar circumstances. (9) As to the cause itself, though the first decree may be right, which I rather think it is, I doubt whether it is a necessary consequence that the second decree, which gives the account against the infant, is right also. In the cases of decrees for dowresses, and for heirs at law against devisees, the courts of equity seem to give a remedy beyond what courts of law can give. So they do in other cases; as in the case of a bond creditor filing his bill against the heir, where the Court gives an account of past rents and profits, which the [*] law could not; and though, at law, he could have rents and profits in future only, and not the inheritance, this Court orders an immediate sale of the inheritance; and I believe this Court gives further remedy to dowresses than they can have at law, even in cases where there is no impediment to prevent their recovery there.

The cause stood over till this day, (30th *June*,) when his Honor gave his judgment to the following effect:

The decree of Lord *Kenyon* is, certainly, an express decision that the executors of the widow were entitled to an account of the rents from the different parties, and that the death of *Thomas Curtis* made no difference. On the verdict in the writ of dower, no judgment is given by the courts of law; and Lord *Kenyon* thought none was necessary, but that the *postea* was sufficient. The regular judgment, if the widow had been left altogether to her remedy at law, would have been that she should recover the damages assessed, as well as the possession of the third part of the lands: and I must admit, that, if she had been left to her remedy at law, she would have lost all arrears incurred in the life-time of *Thomas Curtis*, by his death before she had obtained a judgment against him. On this petition of rehearing, which is preferred as well by the executors of *Thomas Curtis* as by the infant *Thomas Lemm*, it is contended that the widow had no equity whatever, as to her claim of dower, and that the bill ought not to have been retained by the original decree. On the other side, it is said that the retaining the bill is, in itself, giving a jurisdiction to the Court, and that the widow's bill cannot now be dismissed without reversing that decree, which is not complained of by this petition of rehearing. If I thought the first decree wrong, I must have determined this previous point; and I am much inclined to think that the retaining a bill is not, in itself, a determination that relief in equity must, ultimately, be given. So Lord *Kenyon* certainly thought in *Geast v. Barber*, [*ante*, 61.] If this petition of re-hearing had been to the Lord *Chancellor*, surely, if he had thought the widow had no business in equity, he might have dismissed her bill without going through the form of reversing Lord *Bathurst's* decree. However I need not decide this, because I think Lord *Bathurst's* opinion perfectly right.

[*] It is said, that dower is a demand at law: Yes, it certainly is so, and it is now too late to contend that the widow can have her dower out of any estate in which her husband had not the legal fee; for *Banks v. Sutton* (2 P. Wms. 700.) is not now to be supported; not that there ap-

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(9) See *Geast v. Barber*, *ante* 61., and the Editor's notes.

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pears to have been any decision, directly contradicting it, for *Attorney General v. Scott* (Forrest, 138.) did not mean to find fault with *Banks v. Sutton*. However it is now a settled point.† Dower therefore is a mere legal demand, and the widow's remedy is *prima facie* at law. But then the question comes, whether the widow cannot come either for a discovery of those facts which may enable her to proceed at law, and, on an allegation (10) of impediments thrown in her way in her proceedings at law, this Court has not a right to assume a jurisdiction, to the extent of giving her relief for her dower, and, if the alleged facts (10) are not positively denied, to give her the full assistance of this Court, she being, in conscience as well as law, entitled to her dower. Her remedy at law is a writ of dower. Generally there are no damages in real actions, but so favorable was the law to this particular action, that it provided a special relief for the widow, by giving her damages. If the widow was disturbed in her quarantine, she had a particular writ penned for her relief. As to dower, the widow, at first, was only entitled to have an assignment of the land by metes and bounds. Then came the statute of *Merton*, which showed particular anxiety for the relief of widows; and it is curious to see, that the attempt, now, is to drive the widow to that remedy, as the least advantageous, though it is very evident the statute was meant to give her an additional remedy. The deforcers of dower are (by that statute) to be *in mercy*, or fined at the pleasure of the king, which, in those days was a very serious thing, and was meant as a real punishment to deforcers. I own I think it an odd construction of this statute, that the damages given by it are to be considered strictly as damages, that is, as vindictive damages in the breast of a jury, and not capable of ascertainment by the Court, and that, therefore, they are to die with the person: however, so it has been determined. As to what is said in *Sayer's Law of Damages*, that a widow shall have no damages when her dower is assigned to her in Chancery, it, certainly, is a mistake of the meaning of Co. Lit. 33. a.; for *Coke* is there speaking of [*] the writ *de Dote assignandd*, issued by the Court of Chancery, and not a decree of a court of equity. In *Fitzherbert's Natura Brevium*, the nature of the writ *de Dote assignandd* appears very clear; and on this there are no damages, because there is no deforcement of the widow, who is put to no trouble, but has a summary remedy provided for her.

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Now, as to the cases which have been cited, *Hutton v. Simpson*, 2 Vern. 722. does not seem to bear much upon this case; *Tilly v. Bridges*, Pre. Ch. 252. is also reported in 2 Vern. 519., and I have some doubt about the authority of that case, for it is more particularly stated in Vernon than in Pre. Ch. and yet, what is said in Vernon as to the injunction not preventing the entry, certainly cannot be right. Duke of Bolton v. Deane, *Norton v. Frecker*, and other cases, have been mentioned, to show that there must be some fraud to give this Court a juris-

† See *Dixon v. Saville*, ante, vol. i. p. 326.

(10) Although there were allegations in the bill as to the defendant's conduct in forcibly taking away deeds, &c. belonging to the plaintiff's separate estate, there were none whatever of like nature, expressly relative to her claim of dower, as far as appears from *Reg. Lib. notwithstanding what is said by the counsel to the contrary in Mundy v. Mundy*, 2 Ves. jun. 124. If such charges were then thought necessary, it should seem: they would have been inserted as to the precise point, however the defendants conduct in the other respect might have led to a like presumption in this also. It is most probable, that charges of that nature, arising generally from facts, might originally have induced courts of equity to assume a concurrent jurisdiction with the courts of law; and then to improve the relief afforded; but they seem now unnecessary: and it is said in *Watson v. Duke of Northumberland*, 11 Ves. 155., that they have been considered as unnecessary since the determination of the principal case. If this be so, it must be referred to the original hearing of the cause before Lord Bathurst, upon the mere principle of an acknowledged jurisdiction, but the Master of the Rolls (*ubi supra*) seems to rely considerably upon charges of the above nature. See also 2 Ves. jun. 124.

diction,

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diction, and that, in the simple case of a widow claiming her dower, no such jurisdiction exists. *Dormer v. Fortescue* is also brought to show that there must either be an infant concerned, or some particular circumstances in the case, to entitle this Court to proceed. Now it seems difficult to distinguish the two cases of the infant and the widow. The principle in the case of the infant is, that he is thought not conusant of his rights at law, sufficiently to enable him to proceed there, and, therefore, the court of equity will give him all the relief he could have at law, and something more; for, on a bill by an infant for an account, he will get the mesne profits, which would certainly be gone at law by the death of the party. I argue in the same manner for the widow. She comes here, and says the law gives me dower out of the estates of my husband, and the mesne profits from his death: I do not know how to proceed; for if there should turn out to be any mortgage, or term of years in my way (11), then I must pay the costs. The defendant has all the title deeds in his hands (11), and knows what the estates are: his conscience is affected, and yet, instead of putting me in possession of my rights, he turns me out of doors, and keeps all the title deeds. (11) Now, I think this argument is a strong one, on the subject of fraud and concealment on the part of the heir, in not informing the widow of all that is necessary, to enable her to proceed safely at law. If, then, she comes here for a discovery of these matters, which the heir withholds from her, she shall have her complete relief in this Court. If you deny her right to dower, the question must be [*] tried at law: but when the fact is ascertained, she shall have her relief here. It must be supposed the dowress has nothing to live upon but her dower, and the mesne profits are her subsistence from the time of her husband's death; and the course of this Court seems, therefore, to have been to assign her dower, and universally to give her an account from the death of her husband. I admit she has no costs, where the heir has thrown no difficulties in her way; and if the heir admits the widow's case, he is safe. (12) I wished to find, if I could, any instance of the widow's being turned round on such a case as this; but I verily believe there is no such instance; and, indeed, the case of *Moor v. Black* (Forrest, 126.) is pretty clear to show that Lord Talbot thought the widow's claim to be rightly made here; for he over-ruled the demurrer, in that case, on both points. It shows that the difficulty under which a widow labours, is a reason for her coming here. *Delver v. Hunter* does not govern this case; for there the widow had recovered possession. *Lucas v. Calcraft* (12) has also been mentioned, as showing that this Court would give no other relief as to dower, than such as the law would give the widow, and that the Lord Chancellor had refused to give costs, in that case, because no costs were given at law: but, in that case, the heir had thrown no impediment in the widow's way, and, therefore, there were no costs on either side. Now, taking it for granted that the widow, coming after the death of the heir, would not be entitled to her mesne profits, it by no means follows that, when the widow is right in this Court, but the heir happens to die before she has fully established her right, she is not entitled to her mesne profits; for, unquestionably, if the heir, instead of contesting the widow's right, had admitted it, she would have been entitled to her decree for mesne profits, and his having thrown an impediment in her way, shall not make the difference. At the same time, I must again admit that the widow's right at law is gone by the death of the party. *Mordaunt v. Thorold* is principally relied upon as to this point. It has been cited from Salkeld, tit. *Dower*, but it is also reported in 3 Lev. 375. and the result is stated

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(11) All this seems now considered as implied in such cases. The bill in the principal case did not make such allegations. *Vide notes* (5) and (10), *antea*.

(12) See *Lucas v. Calcraft*, *antea*, 1 vol. 134., and the Editor's note, which refers to *Worgan v. Ryder*, 1 Ves. & Beames, 30., where there is a MS. note of *Lucas v. Calcraft*.

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differently in the latter book, though the state of the case seems copied from the other; for in Levinz it is said the Court *inclined* to that opinion, but, it being a new case, they would *advise*, and no decision was given; and it is to be observed, that Levinz was himself counsel in that case. *Aylward v. Robins*, 1 Lev. 38. is mentioned in the former case: there the action was against the *heir of the heir* and the alienee of [*] the heir, and not against the *heir's executor*; and the ground of that case was, that neither the heir nor the alienee were deforcers, and the damages were not a lien upon the land: and then the distinction is taken between the cases of tythes and dower: that in the first case, the damages were certain; in dower, uncertain; but, surely, in common sense, they are equally certain. If it were not for the case of *Mordaunt v. Thorold*, I really should have doubted much the construction of this statute: I should have thought that the damages given by the statute were certain, and were not arbitrary uncertain damages to be ascertained by the discretion of a jury. *However it does seem a settled point at law, and that, at law, the widow could not have recovered against the executor of Thomas Curtis.*

This being so, it is insisted on the part of the widow, that still she has a right to come here, for full relief, and that she ought to be in the same situation as if the heir had admitted her claim at first, (and, to be sure, in this case, the heir has given every opposition to her claim that he possibly could,) and that in this and many other cases, this Court gives a further remedy than the law will do. (13) It is true, where the law gives neither right nor remedy, however hard it may be, equity cannot assist. So in the case of damages for a personal injury, which arises *ex delicto* and not *ex contractu*, they are gone with the person, but it is not so clear in the case of a demand the recovery of which has been prevented by a difficulty unconscientiously thrown in the way by another person. There equity will give relief, and the relief it gives is beyond that which the party could obtain at law. It is the practice in equity, that bond-creditors coming for a distribution of assets shall have an account of rents and profits, which they could not have at law. And yet the same argument might be used against that additional relief as has been used in this case. The law gives the creditor only the land to hold, until he is satisfied. Equity goes further, and says, if the remedy at law is not sufficient, we will sell the inheritance of the estate, and if that will not do, we will direct an account of rents and profits against the heir. *Dormer v. Foretscue*, certainly, supports these ideas very strongly, though, I am sure, Lord Hardwicke's words must have been misconceived by Mr. Atkyns, as to what he has supposed to have said in respect of the time from which the statute of 9 Hen. 3. gives the widow [*] damages. But, as far as one can collect Lord Hardwicke's sentiments, from that case, he thought this Court would expect the widow to establish her title at law, but, she having so done, would give her relief here as to the mesne profits. That is saying, let the widow bring her action at law, out of form, for the purpose of determining her title to dower, and, when she has done that, we will give her an adequate remedy: here I confess, *I agree most fully in thinking that the widow labours under so many disadvantages at law, from the embarrassments of trust-terms, &c. that she is fully entitled to every assistance that this Court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained.* (14)

I am of opinion, therefore, in this case, that, as against the executor

(13) Vide note (2), *antea*.

(14) Vide note (2), *antea*; Lord Redensdale's MS. notes also refer to *Allen v. Sayer*, 2 Vern. 368., where an account of mesne profits was directed in the case of an infant who was debarred of his remedy at law by a fine levied through the laches of his trustee.

of *Thomas Curtis*, there must be an account, and that the former decree is right in this particular.

As to the other point, there seems to have been a slip in the former decree, and the infant must now have an inquiry, as to what estates *Paul Downton Curtis* died seised of:

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DEAN against DALTON.

(Reg. Lib. 1788. A. fol. 553. b.)

Lincoln's Inn
Hall, 11th July.

ANN Joyce, by her will (made in the life-time of her sisters *Anna Bewnell* and *Martha Robinson*) bequeathed unto the defendants *John Dalton* and *William Dansey*, all and every sum and sums of money which she should die possessed of, in the public funds, after payment of her debts, &c. upon certain trusts, and also bequeathed unto each of the said *John Dalton* and *William Dansey*, for their trouble (2) in the trusts reposed in them, 100*l.* and appointed her said sisters joint executrixes of her will.

Testatrix by will, made defendants trustees, and gave them legacies: by codicil; she made them executors, and ordered them to be paid for journeys and expences; this shews her intention to make them executors in trust only. (1)

Ann Joyce, after the death of her sister *Martha Robinson*, but in the life-time of *Anna Bewnell*, made a codicil to her will, 8 August, 1787, whereby after taking notice of the death of her said sister *Martha Robinson*, who was one of her executrixes, she appointed the said defendants, *John Dalton* and *William Dansey*, joint executors, with her surviving sister, *Anna Bewnell*, executrix, and thereby ratified all parts of her will not thereby altered, [*] and directed, that her executors should be paid and saved harmless from all expences, journies, and charges they should occasionally be put to, in the execution of her said will and codicil, and that they should not be answerable for the default of each other.

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The sister *Anna Bewnell* died in the October following, and *Ann Joyce* was entitled to the administration of her effects, but dying soon after, 19th November, 1787, did not administer to her.

The defendants proved the will of *Ann Joyce*, and took out administration to the estate of *Anna Bewnell*, and possessed themselves of personal estate of *Ann Joyce* and *Anna Bewnell*, to an amount much more than sufficient to pay their debts, and the general legacies bequeathed by *Ann Joyce*.

The plaintiffs, besides claiming legacies comprized in the trust fund, claimed the residue, as next of kin of the testatrix, no disposal having been made thereof, by the will or codicil, insisting, by their bill, that the defendants took as executors in trust only.

The defendants, by their answer, admitted all the facts, but submitted, whether they were not entitled, as surviving executors, to the residue of her personal estate, no legacy having been bequeathed to them by the codicil, by which they were appointed executors, jointly with the said *Anna Bewnell*, and the legacies given them by the will, being given them only for their trouble in the trusts, by such will, reposed in them.

Mr. *Mansfield* was beginning for the plaintiffs — but Lord Chancellor stopped him, by desiring to hear what the executors had to say.

Mr. *Solicitor General* and Mr. *Ainge*, for the defendants. — The legacies of 100*l.* each are given to the defendants, *Dalton* and *Dansey*, by

(1) See the Editor's notes to *Martin v. Rebow*, ante, 1 vol. 154. See also *Middleton v. Spicer*, 1 vol. 201.; and note the peculiarity in *Batteley v. Windle*, ibid. 31.

(2) See the decree in *Foster v. Munt*, from Reg. Lib. 1 Raithby's Vernon, 473. and in the Editor's note (4) to *Martin v. Rebow*, ante, 1 vol. 154.

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name, (3) as trustees, for their trouble in the execution of the trusts reposed in them by the will, not in the character of executors, for they are not appointed executors by the will. By the codicil they are appointed executors, together with the sister, but, by that, they have no legacies. If there had been [*] only a will, and both the sisters had survived the testatrix, they would have taken the whole residue as executrices (there being no disposition of the residue) then, upon one of them dying, the survivor would have taken the whole (had no codicil been made) in the same character, of executrix, then, by the codicil, the testatrix constitutes the defendants as much executors as the surviving sister executrix, and they must have taken the residue with her as executors.—The words directing that they should be paid for their journeys and expences, are not sufficient to take away the effect of the former words, and convert them into trustees.

Lord Chancellor.—The intention will convert an executor into a trustee.

Mr. Solicitor General.—Under all the latter cases, it is held that, in order to raise a construction, to convert an executor into a trustee, there must be an implication plain. The first, executrices were also next of kin. Any argument to shew the executor shall not take, must shew the sisters were not to take as executrices, but as next of kin.

Lord Chancellor.—Executors are never paid for trouble and journeys, the legacies are their reward. Here, they must be paid for their journeys as other persons are, not merely the money out of pocket. There is nothing in the argument that it was to give them a prior charge for their expences, as they must come out of the residuary fund; putting in the words, therefore, is a demonstration of her intention to make them trustees. (4)

(3) The argument here wished to approximate the case to *Bowker v. Hunter*, *antea*, 1 vol. 328.

(4) Mr. Cox's MS. notes supply the following addition to Lord Thurlow's judgment. "Any expressions that can be caught in a will are sufficient to turn executors into trustees. Where the only circumstance relied on is the giving them legacies, the Court has come to a rule upon the subject—perhaps not a very good one: however that must now be abided by; but, in this case, *I rest upon the clause in the codicil*, which provides that the executors shall be indemnified for all the charges and expences they should be put to in the execution of the will, which, I think, is quite sufficient to shew she considered them only as trustees."

[Vide judgment
in S. C. 2 Cox,
174.]

Lincoln's Inn
Hall, 13th July.

Covenant in a
lease to renew
under the same
covenants is
exclusive of the
covenant of
renewal (1)

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TRITTON against FOOTE.

(No entry.)

BILL for a specific-performance of a covenant, to renew a lease.

The bill stated, that by indenture of lease, dated 3d December, 1765. between the Reverend Francis Hender Foote, and the plaintiff, the said Francis Hender Foote demised to the plaintiff, [*] his executors, administrators, and assigns, a capital messuage, called *Haugh, &c.* And also certain

(1) *Vide Somerville v. Chapman*, *antea*, 1 vol. 61, and the notes. It appears evident, from the most mature decisions, that Lord Thurlow was wrong in holding that a Court ought never to enforce an express covenant for perpetual renewal (see *per* Lord Eldon, C. 9 Ves. 330, 331. and 16 Ves. 84.); and that Courts of equity will effectuate clear and distinct contracts of such nature. The construction of such covenants is the same in equity as at law, and all the Courts are unfavourable to any constructive inference in favour of such a claim. It is on this ground, therefore, that they will not assist parties, who, having

certain arable, meadow, and pasture land, in the parish of *Herne*, Com. *Kent*, and other premises in the said lease mentioned, with a reservation of timber-trees, and other reservations, from the 10th *October* then last past, for the term of twenty-one years, at the rent of 192*l.* 10*s.* *per annum*, and the further rent of 5*l.* *per annum*, for every acre or piece of pasture therein named, which the plaintiff, &c. should plough up or convert into tillage during the term. And the said lease contained a covenant on the part of the lessor, that he, his executors, &c. should and would, *at the end and determination of the said term of twenty-one years, seal and execute a new lease of the said demised premises, for the further term of seven years*, to commence from the end of the said term of twenty-one years thereby demised, *subject to the same rents*, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements in all respects as are in and by the said indenture of lease mentioned and expressed, *in case the plaintiff, his executors, &c. should desire the same*; plaintiff, his executors or administrators, or either of them, first giving twelve months' notice, under his or their hands, in writing, to said Francis Hender Foote, his heirs or assigns of his or their desiring such further term of seven years as aforesaid.

The lessor died in the year 1773, having made his will, whereby he devised the premises to trustees, of whom the survivor is one of the defendants, to the use of *John Foote*, the testator's son, for life, remainder to his first and other sons, in tail, of whom the first son, (being the first taker of the inheritance,) was also a defendant.

The plaintiff, 4th *May*, 1785, gave notice to the lessor's eldest son, then tenant for life, of his desire to renew the lease; and an indenture of lease for a further term of seven years from the said term of twenty-one years, and subject to, and under the same rents, exceptions, covenants, and agreements, as are contained in the first indenture of lease, was prepared by the direction of the plaintiff and tendered to the said *John Foote*, who refused to execute the same, because a covenant providing for granting a new lease to the plaintiff, &c. for a further term of seven years, to commence from the end of the said term of seven [*] years, expressed to be granted by such lease, so tendered, was contained therein.

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The defendant, *John*, by his answer, stated, that he executed in the presence of plaintiff, and tendered to him a lease of the said farm, for seven years, from the expiration of the lease for twenty-one years, and similar thereto, except that there was no covenant for a renewal, or granting of a new lease: and insisted that no covenant for renewal ought to be inserted in such lease for seven years, and that the meaning of the covenant in the lease for twenty-one years, was merely to secure to the plaintiff a further term of seven years, and not to give him or his representatives a power of renewing the said lease from time to time, at the end of every seven years, as long as they should think proper, and that it was so understood at the time; for the defendant had understood the plaintiff declared, he was glad the covenant for renewal was inserted, as he should, by means thereof, be sure of the premises for twenty-eight years, if he liked it.

The other defendant's answers were to the same effect.

once had the benefit of such a covenant, have lost it by laches or mere accident. *Vide ut supra*, *Bayley v. Corporation of Leominster*, post. 3 vol. 529. and 1 Ves. jun. 476. *Baynham v. Guy's Hospital*, 3 Ves. 298. *Moore v. Foley*, 6 Ves. 232. 237. &c. *Iggulden v. May*, 9 Ves. 325. &c. *City of London v. Mitford*, 14 Ves. 41. *Watson v. Hemsworth Hospital*, *ibid.* 324., and *Willm v. Willm*, 16 Ves. 72. 84. &c., with the several cases referred to in the above authorities. It should, however, be observed, that in *Rawsterne v. Bentley*, post. 4 vol. 415. the Court gave relief where there had been some degree of negligence in the party, whereby he had lost his legal interest in the premises, which seems to militate with the doctrine above cited, as to the construction being the same in equity as at law.

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against
Footes.

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against
FOOTN.

Mr. *Solicitor General*, for the plaintiff, insisted, that this covenant amounted to a covenant for a perpetual renewal, the renewed lease being to be subject to the same rents, and pursuant to the same covenants and agreements in all respects as are contained in the lease for twenty-one years, and to show that such covenant for a perpetual renewal was lawful he cited, and stated at large, the cases of *Bridges v. Hitchcock*, 1 Brown's Parl. Cas. 522. and *Cooke v. Booth*, Cowp. 819. and also referred to *Furnival v. Crew*, 3 Atk. 83. and a case before the present Lord Chancellor (*Rees v. Lord Dacre*) (2) where his Lordship ordered an action to be brought, in order to try the effect of the covenant. (2)

Lord Chancellor said, his present inclination was to dismiss the bill;

But Mr. *Mansfield* suggesting that, in that case the plaintiff would not have his lease for seven years;

His Lordship declared (3) him entitled to a lease for seven years only, and said that he had not an idea that the intention of the [*] lessor was, to renew the covenant of renewal, or that it could be so construed in a Court of equity; and that he made this decree for the same reasons that Lord *Mansfield* gave in the case before him. †

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† The counsel for the defendants in this cause not being heard, the case of *Russell v. Darwin* (4) (before Lord Camden, July 21, 1767) which the reporter understands would have been cited by them, was not mentioned. It is slightly referred to by the counsel for the defendant, in *Cooke v. Booth*, but as the reporter has a fuller note of it than that given by Mr. *Cowper*, in his report of that case, he has here subjoined it.

William Lord Molyneux, and Lady *Bridget* his wife, by lease dated 21 Jan. 1705, and by fine, demised to *Richard Russel*, his executors, &c. a farm called *Danswater*, in the parish of *Kingston*, Com. *Hertford*, to hold for 99 years, if three persons, viz. *Elizabeth Russel*, *James Else*, and *Thomas Else*, junior, or any of them, should so long live, rendering rent. And the said Lord *Molyneux* covenanted, for himself, and for the said Lady *Bridget*, their heirs and assigns, that he or they should and would, upon the death of any of the appointees (by name) add a new third life, upon payment of 200*l.* within six months; or, upon the death of two of them (by name) within six months add two new lives, upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.*, make a new lease or grant for any three new lives, to be nominated and appointed by the said *Richard Russel*, his executors, administrators, or assigns, for the like term as was thereby demised, at and under the like rent, covenants, and agreements, therein contained.

Richard Russel, the lessee, died, and *Elizabeth*, his daughter, intermarried with *Thomas Russel*, and survived him; and they had issue *Richard Russel*, who took out administration to his father.

Thomas Else and *James Else* died before *Elizabeth Russel*, and the plaintiff neglected to apply for any renewal till the death of his mother, *Elizabeth*, in 1762; and then he applied to the defendants, who claimed under Lord *Molyneux*, for a renewal, and tendered the ingrossment of a lease to them for 99 years, renewable upon the dropping of three new lives, at the old rent, with a covenant for renewal of that lease, in the same words, or to the same effect, as had been contained in the original lease of 1705, tendering, at the same time, the fine of 1150*l.* and the defendant declined executing any such lease with any such covenant; whereupon *Richard Russel* filed his bill against the defendants, to compel them to execute such new lease, with such covenant of renewal as was contained in the ingrossment so tendered.

And the cause coming on to be heard before Lord Chancellor *Camden*, his lordship was of opinion, that the defendants were not under any obligation to grant any further lease than for three new lives only, and that the plaintiff was not entitled to have any covenant inserted for any further renewal, the words of the old covenant not obliging the lessors to grant a new lease, but upon the death of some one of the three persons named in that lease; and they being all dead, the plaintiff could claim no further renewal; and therefore his lordship decreed the defendants, upon payment to them of the fine of 1150*l.* to grant to the plaintiff a new lease for 99 years, renewable on the deaths of three persons named in the prepared lease, but without any covenant for any further renewal.

(2) See it stated from Sir *Samuel Romilly's* notes, 9 Ves. 332. whence it appears that the action was not brought; and that an inquiry afterwards directed was not prosecuted.

(3) See the judgment, 2 Cox, 171.

(4) See in *Moore v. Foley*, 6 Ves. 237. and the cases and references in note (1) *ante*.

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[*] REVET against BRAHAM.

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(No Entry on this Occasion.)

Lincoln's Inn
Hall, 14th July.

THE defendant being abroad, brought ejectment to recover the premises in question, as devisee of Mrs. *Elizabeth Braham*, against her heir-at-law.

The plaintiff, the heir, filed a bill, charging fraud in the manner of obtaining the will, by the devisee and other defendants in the cause.

Mr. *Abbot* moved, on a former day, for an injunction to stay proceedings in the ejectment till the coming in of the defendant's answer; but the affidavit then charging fraud upon the defendants generally, and not particularizing the defendant *Braham*, who was abroad, Lord Chancellor ordered it to stand over till the next Seal.

Accordingly, on this day, Mr. *Abbot* moved it again, upon an affidavit, charging, 1st, that the defendant *Braham* was in the house of the testatrix at the time when the will was made, and was active in preventing the plaintiff from seeing the testatrix. 2d, That he gave instructions for drawing the will different from those given by the testatrix.

He said, that, in *Farrar v. Sir Watkin Lewis*, [2 Dick. 729.] 5th Feb. 1789, where this matter had been much canvassed, the affidavit, drawn in the general form, (1) had been approved of.

Where the defendant is abroad, a motion for injunction to stay proceedings at law must be on special ground. (1)

(1) The practice of the Court of Chancery differs in many important respects from that of the Court of Exchequer, as to the process of obtaining injunctions, and as to the effect of them when obtained; which (*inter alia*) may be observed in the under-mentioned references. Where a defendant is abroad, the Court of Chancery will not allow that service of the subpoena to compel appearance, whereupon to found an injunction may be deemed good service, without an affidavit of merits in the first instance; whereas the Court of Exchequer allows of the substitution of service without an affidavit, and requires the affidavit of merits merely on the application for an injunction. *Vide Stephens v. Cini*, 4 Ves. 559, 560. *Baillie v. Larkins*, before Lord Eldon C. 10 Feb. 1818, cited 3 Madd. Rep. 551. *Kewworthy v. Accunor*, *ibid.* 550.

This difference arises partly from the nature and effect of the writ of injunction in the respective courts. After declaration delivered in an action a common injunction out of the Court of Exchequer stays all further proceedings at law in the first instance, except in an issuable term, where the cause of action is not in London or Middlesex, 1 Fowler's Exch. Pract. 219, 220. In Chancery it is otherwise, and plaintiff must there obtain the common injunction to stay execution in the first instance, and afterwards move to extend it to stay trial; which latter motion, it seems, cannot ordinarily be made on the same day with the motion of course for the common injunction.

See *Garlick v. Pearson*, 10 Ves. 450. *Nelthorpe v. Law*, 13 Ves. 323. *Bishton v. Birch*, 2 Ves. & Beames, 41. *Bullen v. Ovey*, 16 Ves. 141, &c. To obtain such extension, the Court of Chancery was for a long time content with a slight affidavit, to the effect merely that the party could not go safely to trial without the discovery sought by his bill; in which affidavit, it is observable, there was no pledge that he could proceed if he were supplied with it. Lord Eldon corrected the practice as soon as he perceived the defect, with that unaffected candour and simplicity which always distinguishes a great mind; although before his lordship became so apprised, he had repeatedly said, "a slight affidavit was sufficient." *Hartley v. Hobson*, 2 Dick. 728. *Farrar v. Lewis* (*cit. supra*) *ibid.* 729. *Nelthorpe v. Law*, 13 Ves. 323. *Partington v. Hobson*, 16 Ves. 220. The argument in that very case citing *Rix v. Long*, in the Exchequer (*ibid.* p. 221.), seems to have struck Lord Eldon with the too remiss practice so long prevalent in his own Court; and it is honourable to his lordship that the practice was corrected within two days afterwards; for in the very next case, of *Appleyard v. Seton*, 13 Ves. 223, the Lord Chancellor required the party to pledge himself that the discovery sought, when made, would be material to his defence: This has been the settled course since. *Earnshaw v. Thornhill*, 18 Ves. 485, 488. and *White v. Steinwacks*, 19 Ves. 83, &c. In which cases, see other points relative to the extended injunction, when existing; viz. that the Court having given credit to the party's affidavit, will not, after such a pledge, allow a discussion of the facts of the materiality thus asserted, &c. &c.

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Lord Chancellor was of opinion, that, when the defendant was here, and could put in his answer easily, the general form was sufficient (2); but when the defendant was abroad, there should be special ground to show that the discovery required from him was material.

His Lordship granted the injunction.

(2) See note (1) in the preceding page.

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[*] HANKIN against MIDDLEDITCH.

(Reg. Lib. 1788. A. fol. 412. Entered *Hankin v. Attorney General*.)

[14th July.]
Motion that a witness be examined *de bene esse*, being the only witness to a material fact granted. (1)

MR. Abbot moved, that a witness might be examined, *de bene esse*, the affidavit being that he was the only witness to a fact material to the cause, though no age was sworn to; and said this had been allowed in *Shirley v. Ferrer*, 3 Wms. 77. and lately in two cases of *Jenkins v. Tucker*, and *Bridges v. Bridges*.

Motion granted.

(1) See also *Marson v. Ward*, 2 Dick. 648. These motions used formerly to be made merely *ex parte*; but Lord Eldon C., in 1802, required them to be made upon notice, which practice has been since adhered to. *Bellamy v. Jones* [and *Rothery*], 8 Ves. 32. In Lord Chalmers v. Earl of Oxford, post. 4 vol. 157. and MS., two witnesses were examined, *de bene esse*, upon the same principle. It will be observed that the above point, as to notice, is referable only to the motion; for previous notice, as to the examination of the witness, is indispensable in all cases, that the other side may have the power of cross-examination. See *Loveden v. Lord Milford*, post. 4 vol. 540. The affidavit in the principal case was, "that one R. W. was a very material witness on behalf of the plaintiffs in the cause, and could give evidence to several facts and circumstances, the proof whereof was essentially for the plaintiffs' interest in the cause; and that the said R. W. was (as deponent was informed and believed) the only person who could speak to the several facts and circumstances in the cause to which the said R. W. was to be interrogated." R. L. Query whether the affidavit was not sufficient in *Rowe's case*, 13 Ves. 261.?

[For the judgment see S. C. 2 Cox, 183.]
Lincoln's Inn Hall, 18th July, 1789.

[If a plaintiff has the assistance of a Court of Equity to set aside an usurious contract, it must be on the terms of repaying what was really advanced with legal interest. (1)]

SCOTT against NESBIT,

(Reg. Lib. 1788. B. fol. 478.)

CHARLES NESBIT, Hugh Hammersly, and Samuel Sneyd, as executors of the late Countess Dowager of Macclesfield, filed their bill in this Court against John Nesbit and Bateman Robson, (the surviving executors of Arnold Nesbit) and against Adam Drummond and Moses Franks, (all of them defendants in this cause of *Scott v. Nesbit*), and thereby stated a bond from Albert and Arnold Nesbit, (both since dead,) dated 15th April, 1778, to their testatrix, in the penalty of 14,500*l.* conditioned for payment of 7284*l.* 19*s.* 2*d.* and interest: and, the same being unpaid, the plaintiffs, in Easter Term, 1780, commenced an action against the executors of Arnold Nesbit, to which the defendants pleaded a judgment recovered by Adam Drummond and Moses Franks, on a bond against Arnold Nesbit, in his life-time, for 20,000*l.* and that they had

(1) See the judgment, 2 Cox, 183. and the observations of Lord Eldon C. on it, in *Ware v. Horwood*, 14 Ves. 31. Et vide *Mason v. Gardiner*, post. 4 vol. 436. and S. C. 1 Fonbl. T. Eq. 25. *Ex parte Skip*, 2 Ves. 489. per Lord Eldon C. 9 Ves. 84. But under the general jurisdiction in bankruptcy, which is distinct from that of the Court of Chancery, (6 Ves. 782. 8 Ves. 250), the assignees of a bankrupt are not so compellable. *Ex parte Skip*, ubi supra. per Lord Eldon, in *Benfield v. Solomon*, 9 Ves. 84. and *ex parte Scrivener*, 3 Ves. and Beames. 14.

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fully administered except to the amount of 1050*l.* which was insufficient to discharge the said judgment. The plaintiffs took judgment of *Easter Term*, 1780, for their said debts, to be levied of the testator's effects *quando acciderint*. The bill, therefore, prayed an account of the money really due on the bond to *Drummond* and *Franks*, and of the estate of *Arnold Nesbit*, and that the same money be applied, first, in discharge of the debt to *Drummond* and *Franks*, and then in payment of the plaintiffs, as executors, as also in a course of administration. The defendants, to that suit, put in answers, stating a suit to have been instituted by *Susanah Nesbit* (now *Scott*, one of the plaintiffs in the present suit) and *Margaret* [*] *Yeates*, on behalf of themselves and other creditors of *Arnold Nesbit*; and a decree in that cause, 10th *February*, 1783, by which it had been referred to Master *Hett* to take the necessary accounts, in which cause the plaintiffs might have the same relief as by their bill was prayed. And upon 14th *June*, 1785, the cause of *Nesbit v. Nesbit* coming on, it was decreed that the plaintiffs should go in before Master *Hett*, to whom the cause, *Scott v. Nesbit*, stood referred, and that the Master was to take an account of what was due to the plaintiffs on their judgment; and they were to be at liberty to controvert the validity of the debt claimed by *Franks* (*Drummond* having, by answer, disclaimed having any demand) in respect of the judgment for 20,000*l.* and other directions were given for taking such accounts.

The plaintiffs went in before the Master, and claimed their debt, and proceeded in settling the report in the present cause of *Scott v. Nesbit*.

On the 3d of *March*, 1789, the Master made his report, which, with respect to the demand of the plaintiffs, *Nesbit*, *Hammersly*, and *Sneyd*, as executors of Lady *Macclesfield*, is to the following effect:

That the plaintiffs, in the cause of *Nesbit v. Nesbit*, had brought in before him a claim of the sum of 7284*l.* 19*s.* 2*d.* with interest for the same, from the 15th *April*, 1779, at the rate of 8 *per cent. per ann.* and 12*l.* 11*s.* 10*d.* for costs, as due from the estate of said *Arnold Nesbit* to said *Charles Nesbit*, as one of the executors of *Dorothy*, late Countess Dowager of *Macclesfield*, deceased, and as assignee of the other executors, upon a judgment recovered in the Court of King's Bench, in *Easter*, 1780, by said executors of Lady *Macclesfield*, against said *John Nesbit*, *Henry Thrale*, (since deceased,) and *Bateman Robson*, as executors of said testator *Arnold Nesbit*, for assets, *quando acciderint*, which judgment appeared to have been entered upon a joint bond, dated 15th *April*, 1772, entered into by the testator *Arnold Nesbit* and *Albert Nesbit*, who died in the life-time of the said *Arnold Nesbit*, to the said Countess Dowager of *Macclesfield*, under which bond there is a condition, whereby after reciting that, by indentures of lease and release, dated respectively 3d and 4th *July*, 1770, duly executed in the island of *Barbadoes*, and made between *Thomas* [*] *Tipping*, of the one part, and the said *Arnold Nesbit* and *Albert Nesbit* of the other part, the said *Thomas Tipping*, in consideration of his being justly indebted to said *Arnold Nesbit* and *Albert Nesbit* in the sum of 5219*l.* 4*s.* 4*d.* granted and released to them and their heirs, a plantation in the island of *Barbadoes*, with its appurtenances, and also a plantation in the island of *Tobago*, with its appurtenances, redeemable on payment of 5219*l.* 4*s.* 4*d.* sterling, with interest at 6 *per cent.* and farther reciting, that the said *Thomas Tipping* stood indebted to them the said *Arnold* and *Albert Nesbit* in the sum of 7284*l.* 19*s.* 2*d.* and that he, by letter of attorney, dated in *December*, 1771, appointed them his attorneys to contract and agree with any person for the loan of any sum of money, not exceeding 12,000*l.* either on interest at the usual rate of interest in *Tobago*, or by annuities, or any other manner which they should think proper, and to make his estate in *Tobago* a security for the same; that the said *Arnold* and

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Albert Nesbit having then occasion for the said sum of 7284*l.* 19*s.* 2*d.* they had, as well in pursuance of the powers vested in them by the said letters of attorney, as in their own right as mortgagees, applied to the said *Dorothy*, Countess Dowager of *Macclesfield*, to lend to the said *Thomas Tipping* the like sum of 7284*l.* 19*s.* 2*d.* to enable him to pay the said sum so due to them on the said mortgage; and had agreed that the whole of the said sum should from thenceforth be considered, and to warrant and assure the same accordingly, as and for one consolidated principal sum, carrying interest at the rate aforesaid, they the said *Arnold* and *Albert Nesbit*, by virtue of the said mortgage, sold, released, &c. to the said Countess Dowager the premises in the islands of *Barbadoes* and *Tobago*, freed and discharged of the proviso of redemption in the said indentures of 4th July, 1770, but subject to a proviso of redemption, on payment of said sum of 7284*l.* 19*s.* 2*d.* with interest thereon at 6 per cent.: And further reciting, that the usual rate of interest in the said island of *Tobago* was 8 per cent. and that it had been agreed between the parties, that the said sum should carry interest at that rate; but in regard the sums secured by the mortgage were made to carry interest at 6 per cent. only, and that *Tipping* was then resident in *Barbadoes*; it was therefore agreed, that, in the assignment bearing even date with the said bond, interest should be reserved at the same rate as in the original mortgage, and that the interest should be made up to the rate of 8 per cent. and the same be further secured by the personal bond and obligation of the said *Arnold* and *Albert* [*] *Nesbit*, it was declared, that if the said *Thomas Tipping*, or *Arnold* and *Albert Nesbit*, &c. should pay to the said Countess Dowager of *Macclesfield* the said sum of 7289*l.* 19*s.* 2*d.* with interest at 8 per cent. then the bond should be void. And the Master certified, that by a deed duly executed by said *Thomas Tipping*, he ratified and confirmed the said indentures of lease and release, and the acts of the said *Arnold* and *Albert Nesbit*, as his attorneys. And the Master certified, that it appeared to him that the said *Arnold* and *Albert Nesbit*, during their lives, and the said *Arnold Nesbit*, after the decease of said *Albert Nesbit*, during his life paid to the said Countess Dowager interest for the said 7284*l.* 19*s.* 2*d.* after the rate of 8 per cent. and charged the same to *Tipping* in their accounts with him. And the Master certified, that he conceived the said bond was null and void, by reason of the act of parliament 12 Ann, to reduce the rate of interest, and not protected by the act, 14 of his present Majesty, for explaining the said act, and, therefore, he had not allowed of the said claim of the said *Charles Nesbit*, *Hugh Hammersly*, and *Samuel Sneyd*. Whilst the report was in draft, the executors of Lady *Macclesfield* carried in two objections thereto: the 1st, in consequence of his having disallowed their claim as usurious; and the 2d, on account of certain allowances made to the defendant, *John Nesbit*, which the Master disallowed, and made his report as above stated; to which the executors took exceptions to the like purport with the objections, and which came on to be argued before Lord Chancellor, the 19th and 26th June last. The first exception only was entered into.

Mr. *Hardinge*, Mr. *Hollist*, and Mr. *Mitford*, for the executors of Lady *Macclesfield*, argued,

1st. That it was too late, after the judgment, to contest the question of usury.

2d. That this bond was protected by the act of his present Majesty.

3d. That if not, as the transaction might have been legally executed, it ought to be considered as having been so.

4th. That the creditors at large could not get rid of the judgment, without paying what was really due, with interest at 5 per cent.

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[*] As to the first point, they contended that it was not competent to the

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the Master to take this question into consideration. The only matter referred to him, was to compute what was due upon the judgment recovered, not whether they ought to have recovered or not. If the defendants, at law, had prayed oyer of the bond, and it appeared to be usurious, they might have demurred, but having suffered judgment, they are too late afterwards to litigate the question. (2) It could not be permitted upon a *scire facias*: as nothing can be pleaded to the *scire facias* that might have been pleaded to the original action, *Cook v. Jones*, Cowp. 727. In *Bodily v. Bellamy*, 2 Burrow, 1094, in an action on a bond given in the *East Indies*, the plaintiff had added a count in a *mutuatus*, and judgment was taken upon both counts. The defendant insisted, that no more could be taken than the penalty; the Court would not, after judgment, order satisfaction to be entered upon those terms. In this case, the general creditors are not injured, as the *Nesbits* charged the money paid to Lady *Macclesfield* to their correspondents.

2dly, Then the next question is. Whether this case is protected by the act of his present Majesty? The intention of the act was only to provide for future loans. With respect to loans already made, it was only to obviate doubts, or make the securities equally valid, as if they had been executed in the colony where the lands lay, although the interest was above 5 per cent. if it was the interest of the island, &c. where the lands were. Here the case is the same as if the security had been made in the island of *Tobago*, where *Tipping* lived at the time of the first security, and where the transaction would have undoubtedly bound *Tipping*, and the *Nesbits*, as his attornies, if the securities had been put in suit there. But the Master thought that the interest secured by the bond must be the same interest that was secured by the mortgage, which is not made necessary by the act.

3dly, Where a transaction might have been legally executed, the Court will suppose it to have been done, and will rectify the mistake. This might have been so transacted, by making a mortgage of the *Tobago* estate at 8 per cent. as attornies to *Tipping*, and under the authority given by him, and making the *Barbadoes* estate merely a collateral security. In that case, the bond would have been agreeable to the reservation of interest upon the security of the *Tobago* estate, which would have obviated [*] the doubt entertained by the Master, and no objection could have been taken, that Lady *Macclesfield* had taken too high a rate of interest. In *Murray v. Harding*, 2 Black. 864. Lord Chief Justice *De Grey* says, "another circumstance is the form of the instrument; if that imports a loan, and it was so meant, the contract may become usurious. At the same time, if the transaction be *bond fide*, the blunder of the agent shall not make it other," and cites *Cro. Jac.* 678. *Stonhouse v. Read*. Here the intention certainly was not to do any thing but what the parties were competent to do legally. The mortgage deed recites the power under which they acted, and which was to charge the estate with interest at 8 per cent.

4. If this was an application by bill, by the persons representing *Nesbit*, your Lordship would not prevent the legal operation of the judgment, except upon the terms of their doing equity by paying the principal, with the interest allowed of by the Court, especially in a case where the intention was to do an act which would have been legal if done in *Tobago*, where the lands which were the subject of the security lie.

Mr. *Mansfield* and Mr. *Stratford* for the plaintiffs, the creditors of *Arnold Nesbit*.—However unfortunate it may be, this bond is void *ab*

(2) See the observations of Lord *Eldon* C. upon this (14 Ves. 31.), cited in the last note to this case.

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initio, therefore not good as a debt; and when the bond is void *ab initio*, the executors having pleaded *plene administraverunt*, does not conclude them. It is said, here is a judgment which cannot be impeached upon the head of usury, because the executors might have pleaded the usury at law; but when a bill is filed by creditors, as this is, they have a right to impeach every debt founded on a transaction void at law, the executors not having pleaded the usurious contract at law, does not preclude the creditors from making the objection here. Then the question is, whether this is a debt that can be supported, and there is not a doubt but that this bond is void by the laws of *England*, with respect to the act of the present king. No bond is within the provision but when it is for the same money as is secured by the mortgage, and in the mortgage there is no covenant for the payment of the usurious interest. The usurious interest being reserved by the bond, makes the contract entirely void; not as in the case of the statute against gaming, where, though the security is void the debt remains. Then it is said that this was a blunder; but that is not the case, [*] the whole was with an intent of taking 8 *per cent.* It is the plain case of a bond for a greater interest than the law allows. *Cook v. James* is a strong case for the parties for whom we are, as the judgment, in that case, under the circumstances of it, was not held to be conclusive.

Mr. *Solicitor General* and *Lloyd* for the executors of *Arnold Nesbit*, —also contended that the bond was void.

There is not a doubt but that, under the statute of *Queen Anne*, a security executed in *England*, by which a greater interest was to be taken than 5 *per cent.* was void as usurious, *Stapleton v. Conway*, 3 *Atk.* 727. but, it being found convenient to have *West India* securities executed here, the act of the present king was made, the policy of which was, to leave former securities at the rate of interest which was legal in the colonies where the lands lay; but, as to future securities, to limit them to 6 *per cent.* That act protects bonds for the same interest as is secured by the mortgage, both in mortgages and transfers of them; but does not extend to derivative mortgages, being only for the benefit of the plantations, the end to which being served by the first mortgage, the derivative mortgage does not answer the purpose. The bonds, intended to be protected by the act, are only such bonds as are collateral securities to the mortgage, or where the money is borrowed on the bond, and a collateral security given on the land there; but this is not a transfer of a mortgage, but a derivative mortgage made of the other mortgage, a new transaction. The *Nesbits* had advanced the money to *Tipping* at 6 *per cent.* It does not appear that there was any transaction between them and *Tipping* at 8 *per cent.*, and, although the authority they derived from him would have enabled them to borrow at 8 *per cent.* yet they have chosen to make a derivative mortgage, which appears by the redemption being reserved on payment by *Tipping*, or by themselves, as agents, or as principals. *Tipping* could have redeemed down to 1755, on payment of 6 *per cent.* so might the *Nesbits* as his agents. The bond therefore is a different debt, not a collateral security to the mortgage. If they meant to act under the power, they should have executed the deed, as the agents of *Tipping*, having done otherwise shows their intent to borrow for their own use. Then, it is said, if the bond be void against the assets of the [*] *Nesbits*, still there is a deed for the money lent, and appearing to be so by the mortgage; but, if so, it is a simple contract debt, not a specialty; and, if it is a simple contract debt at 8 *per cent.* the giving a security on the estates in *Barbadoes* and *Tobago*, will not give a right of action for the mortgage at 6 *per cent.* Where a man makes a mortgage, without covenanting for payment, it is true he contracts a simple contract debt, but it is not so

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where he gives a bond; for the party who takes a specialty elects to abide by that security, and cannot have recourse to the simple contract debt, arising from the giving the mortgage. Then, with respect to the judgment, the executors are not personally liable, because they have no assets. If the judgment has been suffered by the mistake of the executors, they will not be bound by it; much less the creditors. When creditors come here, the Master always enquires into the nature of the debt, on which a judgment is given: the judgment only proves that the testator was indebted, and gives a priority in payment, as a reward for the creditor's diligence; but, it is impossible the executors, having given judgment for an usurious debt, should bind the creditors in a suit which acts upon equitable assets. In a case in Farresly, 119. of *Queen v. Sewell*, Lord *Holt* doubted, on a bond for an usurious contract, whether there could be any remedy. The taking an unavailable security will not help the security the party already had. If there is no specialty debt in this case, there is an end of the judgment, as against the executors, there being no assets for simple contract creditors.

Mr. *Hardinge* in reply, — it was not competent to the Master to exercise his opinion on the validity of the judgment; till got rid of at law, it must bind. At law, it cannot be got rid of; in a court of equity, it may, but not in this shape. This brings me to what is to be done with the 6 per cent. The moment the party comes here to attack the transaction, on the ground of usurious interest, the sum really advanced must be paid with legal interest. All these instruments are to be considered as one instrument, and done *uno flatu*. The thing intended to be done was to convey the *Tobago* estate with *Tobago* interest. What was intended to be done, shall be considered as done; and, though some part of the transaction was improperly executed, that part only which was improper shall be rejected. It is certain that, upon the words, the transaction is clear usury: but it is also [*] manifest that this is only a technical blunder, and against the real meaning of the transaction. The power not only was to convey the *Tobago* estate, but it was to do nothing else, for the power did not comprise the *Barbadoes* estate. They should have executed a mortgage, in the name of the principal, and have thrown the *Barbadoes* estate in, as a collateral security, and the interest should have followed the *Tobago* pledge, according to the true intent of the parties.

Lord *Chancellor*.—Their intention was to make both the estates liable—whether this could be done under the letter of attorney or not, they certainly meant to make a mortgage in chief as well as a bond in chief, but there is something in the point as to paying the money, without taking the benefit of the forfeiture. The Master, in references of this kind, goes upon the same rule that the Court itself goes upon, and the Court would not set the judgment aside, but on the payment of the money actually due. In the case cited in the Court of King's Bench, the Court, on a *scire facias*, ordered an issue to try, whether the contract was usurious; there are several instances at law, where, upon judgments, the Court has directed issues to try the question whether the contracts were usurious.

Mr. *Solicitor General* said, the Court would order the security to be given up, without payment of the money actually advanced; as in the case of a note for a gaming debt.

Lord *Chancellor* took time to consider, whether the money actually advanced should not be paid, with legal interest.

The cause coming on again this day,

Lord *Chancellor* said, (3)—He was of opinion Mr. *Mansfield's* clients

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(3) See the judgment more fully, 2 Cox, 183.

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(the creditors of Arnold Nesbit) might do before the Master, all they could have done by a bill filed by them against the judgment creditors; but that, by a bill, they could displace the judgment, only upon doing what was just; the judgment must therefore stand for the money actually paid, with legal interest. (4)

(4) Lord Eldon C., adverting to the principal case in *Ware v. Howwood*, 14 Ves. 31. says, "Generally speaking, a jurisdiction does not arise here from the mere circumstance that a party has omitted to make a proper defence at law. In the case of *Scott v. Nesbit*, the Master having disallowed a debt on the ground of usury, Lord Thurlow allowed the debt to stand; holding, that the omission to take advantage of the usury at law, was no ground for relief in equity."

[*] *TOURLE against RAND and Others.*

(Reg. Lib. 1788. B. fol. 613.)

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*Lincoln's Inn
Hall, 18th July.*

Mortgagee, of a reversion, not having the title deeds, shall not be postponed to another mortgagee (whose mortgage was made after mortgagor came into possession) who has the title deeds; there being neither fraud nor gross negligence. (1)

THE case, as made upon the pleadings and Master's report, was as follows:—

Cater Rand being, as supposed, entitled under the will of his father, to a remainder in fee (but, in fact, only to a remainder in tail) expectant on the death of his mother, *Lucy Rand*, in certain freehold premises, situate in *Cranley Com. Sussex*, by indenture, dated 31st December, 1776, conveyed his reversion and remainder, expectant on the death of his said mother, in the premises, to defendant *Ingram*, in fee, with a proviso, for redemption upon payment of 450*l.* with interest at 4*l.* per cent. and with the usual covenant for further assurances. At the time of making this mortgage, the deeds and writings were in the hands of *Thomas Overy*, executor of *Ann Rand*, the grandmother of *Cater Rand*, but the defendant *Attree*, defendant *Ingram's* attorney, was informed by defendant *Rand*, that they were in the possession of *Lucy Rand*, mother of said defendant, who would not consent to part with them; *Lucy Rand* being then in possession of the premises, as tenant for life, which she continued till the time of her death, about the 5th December, 1781.—Within a few days after her decease, Mr. *Attree*, as attorney to defendant *Ingram*, applied to the defendant *Rand* for the possession of the title deeds, to which *Rand's* general answer was, that he would send them in a day or two, or to that effect. On the 12th March, 1782, *Rand*, being then tenant in tail in possession (but supposing himself tenant in fee) of the same premises, and also being possessed of a leasehold estate, which he held for a term of 2000 years conveyed the same to the plaintiff, to hold the same for a term of 1000 years, subject to a proviso for redemption, on payment of 250*l.* with interest at 5*l.* per cent. with a covenant to do such further acts with respect to all the said premises, both freehold and leasehold, as should be necessary for securing the plaintiff's estate therein.—At the time of this mortgage being made, all the title-

(1) The doctrine in this case is good law; and it is quite settled, that there must be either fraud, concealment, or such gross negligence as may be presumed to have originated in a fraudulent intention, to postpone a party, under the mere circumstance of his not obtaining possession of title-deeds, even where his security is not upon a mere reversion.—Though Mr. J. Buller had authority for his assertions in *Goodtitle v. Morgan*, 1 T. R. 755., it is clear he was mistaken in point of sound law, and his positions have been expressly over-ruled. See per Lord Eldon C., in *Evans v. Bicknell*, 6 Ves. 183, &c. &c. *Head v. Egerton*, 3 P. W. 279. *Ex parte Kensington*, 2 Ves. and Beames, 83., &c.; and see the Editor's note to *Becket v. Cordley*, ante, 1 vol. 357. As to priorities on the point of notice, &c., see *Becket v. Cordley*, ubi supra, the Editor's note to *Robinson v. Davison*, ante, 1 vol. 63., which refers to *Willoughby v. Willoughby*, 2 Ves. 684. (4th edition), to 15 Ves. 336. note; and 3 Merivale, 210.

deeds,

deeds, relating to the estate, were delivered to Mr. *Cowper*, plaintiff's attorney, and such title deeds continued in the possession or power of the plaintiff. *Rand* never levied or suffered any fine or recovery, pursuant to the covenant for further assurance. And on the 7th July, 1784, [*] a commission of bankruptcy issued against *Rand*, and the defendants *Scruce Attree* and *Verral* were chosen assignees. 1st October, 1784; plaintiff filed his bill to foreclose the mortgaged premises, and, among other things, charged that *Ingram* ought not to have permitted the title-deeds and writings to remain in the hands of *Rand*, that he left the same to continue in his hands for the purpose of enabling him to raise more money on the security of the premises, and that the same was a fraud on the plaintiff, and therefore defendant *Ingram* ought to be compelled to redeem plaintiff's mortgage, or ought to be debarred of any interest he might have in the premises, till plaintiff's mortgage should be satisfied.

It came on now for further directions.

Mr. *Mansfield*, Mr. *Ainge*, and Mr. *Stratford*, for the plaintiff, insisted, that, where a prior mortgagee leaves the title-deeds in the possession of the mortgagor, it is a fraud upon the second mortgagee, as he is induced, by the title appearing on the deed, to lend his money: the second mortgagee, therefore, having the deeds, shall be preferred. Mr. Justice *Burnet*, in *Ryale v. Rowles*, (1 Vesey, 360.) says, "in equity, when deeds are left with a second mortgagee, and the first mortgagee neglects to take them into his possession, the first mortgage is postponed." (2) *Head v. Egerton*, 3 Wms. 280. *Stanhope v. Earl Verney* (3), (cited by Mr. *Butler*, in his note to Co. Lit. 290. b.) on a declaration of a trust of a term, where Lord *Northington* (3) decreed in favour of the second incumbrancer who had the possession of the deeds, against a former assignment without delivery of the deeds. The same has been lately determined by the court of King's Bench (4), on an ejectment by the second mortgagee having the title-deeds, against the first mortgagee who had neglected to take them. The judges there said, it had become an established rule of proceeding in this court, and therefore ought to be adopted in a court of law.† In this case he might have known where the deeds were, and have applied to the tenant for life to have them. There were three months, during which they were in the hands of the mortgagor.

Mr. *Hollist* for defendant *Ingram*. — The plaintiff certainly took the same title as we did; *Rand* produced his father's [*] will, by which the premises were devised to his wife for life, remainder to the mortgagor. If he had looked into the title-deeds, he must have seen that *Rand* was really tenant in tail. Immediately after the death of the tenant for life, defendant's attorney applied for the deeds, and defendant himself got into possession of the mortgaged premises.

Lord Chancellor said, as the judges of the King's Bench probably grounded themselves on cases in this Court, it were to be wished they had named them; that he did not conceive that a first mortgagee not taking

† *Goodtitle v. Morgan*, 1 Term Rep. 755.

(2) And Lord *Eldon* C observes, that this statement passed without any observation made upon it by Lord *Hardwicke*, or any of the other learned persons by whom his lordship was assisted: to which Lord *Eldon* added, that the same doctrine was considered as law by Mr. *Ambler* in *Becket v. Cordley*, (antea, 1 vol. 353). Vide 6 Ves. 183., and the preceding note. The point has, however, been settled to the contrary by late decisions, which were grounded not only upon a sounder principle, but the important previous case of *Head v. Egerton*, 3 P. W. 279.

(3) Ca. temp. Lord *Northington*, 2 vol. 81.

(4) *Goodtitle v. Morgan*, 1 T. R. 755., since over-ruled. Vide 6 Ves. 185., and notes (1) and (2) ante.

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the deeds was, alone, sufficient to postpone him; (5) if it were so, there could be no such thing as a mortgage of a reversion.† In that case, the deed being in the hands of the tenant for life, is not sufficient to turn him round. The first cases where the prior mortgagor was postponed, were cases of fraud, then, the same was done in cases of gross negligence. — Here was no laches, he could not compel the tenant for life to give up the deeds: though a dowress, upon confirmation of her title, may be compelled, the tenant for life could not, although, after her decease, he might have filed a bill, that is not sufficient to charge him. (6)

Mr. Ibbetson, for the assignees, contended that *Rand*, being only tenant in tail, his mortgage was only good for his life, and that, after his decease, the assignees would be entitled to the estate discharged of the mortgage. *Beck v. Welsh*, 1 Wils. 276.

Lord Chancellor. — That point does not arise, yet — If tenant in tail mortgage, and afterwards will suffer a recovery, it will make good the former title — the covenant for further assurance might be taken hold of as a plank.

The second mortgagee refusing to redeem the first,

Bill dismissed.‡

† See *Penner v. Jemmett* (7), 28th June, 1785. — Lord Chancellor held, that there must be a voluntary leaving of the deeds, to entitle the second mortgagee to have the prior mortgage postponed.

‡ In *Edwards v. Applebee, et c contra*, 12th November, 1765, before Lord Northington. (cited upon the former hearing of this cause) — By indenture tripartite, 13th February, 1758, made between *Barrow Smith* and *John Applebee*, of the first part; the plaintiffs the trustees of the second part; and *Edward Maude*, and all other the joint and separate creditors of said *Smith* and *Applebee*, who should sign and seal the premises, of the third part; reciting, among other things, that said *Smith* and *Applebee* were indebted jointly to divers persons, on account of their trade, and also to divers persons on their separate accounts, it was witnessed that the said *Smith* and *Applebee* (by the direction of *Maude*, &c.) did grant, bargain, sell, and assign unto the said plaintiffs, all their joint and separate goods, chattels, &c. (except as [*] therein mentioned) in trust for the benefit of their creditors, and for such uses as therein mentioned; and also reciting *int. al.* that the said *John Applebee* was entitled, as of his own separate estate, to a reversion in fee or fee-tail, expectant on the death of his mother, of divers messuages, &c. in the parish of *Westerham* Com. *Kent*, it was further witnessed, that the said *John Applebee* did, for himself, his heirs, executors, and administrators, covenant with the plaintiffs, to convey and assure to them and their heirs, all his estate and interest therein, &c. upon trust, to be sold, and the money arising thereby to be applied upon the same trusts and purposes as aforesaid. The deed also contained a general covenant from *Smith* and *Applebee*, for further assurances. *Maude*, afterwards, sued out a commission of bankruptcy against *John Applebee*, 23d April, 1760, and he and *Pacatus Shard* were chosen assignees, to whom the commissioners made an assignment, and bargain and sale. The assignees, 21st November, 1760, filed their bill against the plaintiffs, to set aside the trust-deed. On the 13th March, 1761, an order was made, that the parties should bring actions to try their rights, and plaintiffs obtained a verdict in an action of trover against the assignees; the assignees also brought an action against the plaintiffs, but were nonsuited; *Mary Applebee*, mother of *John*, died on the 4th February, 1762, plaintiffs, the trustees filed their bill against the assignees, to have the estates delivered to them; both the causes came on together 12th November 1765, before Lord Northington, when a decree was made, confirming the trust-deed, and ordering the assignees to join in conveying all their estate and interest in the *Westerham* estate, to the plaintiffs the trustees, or as they should appoint, his Lordship being of opinion that as the estate was bound by a specific covenant for further assurance from the bankrupt (8), they are become entitled to that interest, which on the bankruptcy and the operation of law thereon, is now vested in the said defendants the assignees, and the bill filed by the assignees was dismissed with costs.

(5) *Vide also per Lord Eldon* C. 6 Ves. 183., and notes (1) and (2) *antea*.

(6) “The distinction is, that a jointress who has a *partial* interest in the premises, has been compelled by the heir, upon his *confirming her title*, to deliver up the deeds; “but there is no case where the devisee for life of the *whole estate* has been compelled by “the remainder-man to deliver them up.” — *Per Lord Thurlow* C. in his judgment, from the MS. notes of Mr. Cox.

(7) This case (*inter alia*) is cited in *Plumb v. Fluit*, 2 Anstr. 132. 439, 440., *quod vide*.

(8) *Vide S. P. Pye v. Daubux*, post. 3 vol. 595.

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BOSTOCK against BLAKENEY.

(Reg. Lib. 1788. A. fol. 54.)

Lincoln's Inn
Hall, 24th July.

FIELD-Marshal Sir *Robert Rich*, by his will, 31st October, 1767, gave to the late Lord *Orwel*, afterwards Earl of *Shipbrooke*, in *Ireland*, the testator's eldest son *Robert Rich*, (afterwards Sir *Robert Rich*) and *John Bradford*, esq. all since deceased, their executors, administrators, and assigns, such sums in the public funds, as he should die possessed of, upon certain trusts therein mentioned, and, subject thereto, upon the further trust, that the trustees should, so soon as opportunities of making proper purchases should offer, lay out and invest the monies to arise by sale thereof, in one or more purchases of manors, &c. in *England*, to be conveyed to the use of his son, for life, with remainder to his first and other sons, with remainder to the plaintiff, *Mary Frances Bostock* (by the name of *Mary Frances Rich*, only daughter of testator's said son, *Robert Rich*,) and the other daughters of the said *Robert Rich*, in tail, with remainder over; and made the trustees executors of his said will. The Field-Marshal died *February*, 1768, and the executors proved the will and [*] laid out monies in the funds, to the amount of 46,416*l.* 16*s.* 3 *per cent.* annuities.

Sir *Robert Rich*, the son, being entitled to the dividends of the said trust funds or to a life-estate in the lands to be purchased therewith, being desirous of purchasing an estate called *Waverly Abbey*, near *Farnham*, late the estate of *Thomas Orby Hunter*, esq. applied to his co-trustees, for that purpose, who entered into a treaty to purchase the same, (including the furniture) for 19,550*l.* which was conveyed to them subject to the trusts of the will.

On the 12th *June*, 1771, immediately prior to the said conveyance, the trustees sold out 22,981*l.* 13*s.* 4*d.* which produced the sum of 20,373*l.* 9*s.* of which 19,950*l.* only was applied in the purchase of the estate, and the remaining part (except 28*l.* 14*s.* 6*d.* commission, and 50*l.* replaced to the trust) amounting to 344*l.* 14*s.* 6*d.* was applied by Sir *Robert*, the son, to his private use.

Sir *Robert Rich*, the son, entered upon the purchased estate, and, being desirous of altering or improving the grounds, for that purpose, prevailed with the trustees to join him in the sale of so much of the trust funds, as produced 5081*l.* 11*s.* 3½*d.* in cash, which he applied to that purpose, and also at different times prevailed on the trustees to join him in selling several other sums of 10*l.*, 169*l.* 7*s.*, and 7*l.* 15*s.* of the trust fund.

Sir *Robert Rich* died *May*, 1785, without issue male, leaving the plaintiff *Mary*, his only child surviving him, having made his will and a codicil thereto, by which he gave all his real and personal estate away from the plaintiff *Mary*, and appointed the defendants executors, who proved his will and possessed his personal estate more than sufficient to pay his debts, &c.

The plaintiff *Mary* intermarried, during the life-time of her father, with the co-plaintiff *Charles Bostock*, and, upon the death of Sir *Robert Rich*, became seised in trust of the estates then purchased.

In *Michaelmas* Term, 1787, the plaintiffs exhibited their bill, charging

(1) The purchase of *houses* is not due performance of a covenant to purchase *lands* of inheritance, the property being of a *wearing and consuming* nature. See *Pinnel v. Hallet*, 2 *Ves.* 276.; and *Lewis v. Hill*, 1 *Ves.* 275., with the Supplement, 140, 141. 344. It appears also, that in *Pinnel v. Hallet*, a purchase and settlement of *lands* of the nature of *borough-english*, was held an *undue execution* of a covenant to settle "*lands of inheritance*." Vide Supplement to *Ves. senior*, 344.

A trust fund is created by will to be laid out in the purchase of lands — an estate is purchased and trust-money is laid out in repairs and improvements — this is a mis-application, and shall not be allowed. (1) Part of the trust-money was sold out just before a dividend was payable, no allowance can be made to the tenant for life (who would be entitled to the dividend) in the price. Where a trustee sells out trust-money, the *cestui que trust* may elect, whether he will have it replaced, or be paid the produce of it.

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that

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that the trustees were not warranted in advancing any money to Sir Robert Rich, for repairs or improvements of the estate, and praying the money advanced on that [*] account, and also the sums of 344*l.* 14*s.* 6*d.*, 10*l.*, 169*l.* 7*s.*, and 7*l.* 15*s.* and the value of the furniture in the said house, should be paid by the executors of Sir Robert Rich the son, to the present trustees of the trust fund, under the will of Field-Marshal Sir Robert Rich, to be applied according to those trusts.

Defendants, by their answer, admitted the facts, especially the sale of 20,379*l.* 9*s.* of the trust fund, and that only 19,950*l.* was applied, and the residue (after the deduction as aforesaid) amounting to 334*l.* 14*s.* 6*d.* was applied by Sir Robert Rich, the son, to his own use; but they said, at the time the same was sold, a half-yearly dividend was about to come due in a few days, and that the 334*l.* 14*s.* 6*d.* was allowed by the co-trustees to be retained by him on account of such dividend, in regard the price of the trust stock was increased by the dividend then due thereon; and as Sir Robert Rich would have been entitled to receive the half-yearly dividend, if the stock had not been sold, the defendants submitted he was entitled to receive the 344*l.* 14*s.* 6*d.* They also admitted the sale of other sums, for the purpose of improving the estate; but said the same ought not to be repaid to the trust fund, because Sir Robert Rich expended the sum of 24,997*l.* 10*s.* 5*d.* in enlarging and rebuilding the house, and altering and improving the lands at Waverly; by means of which the value of the estate has been increased to a larger amount than the sum expended; and that the sums of 10*l.* and 7*l.* 15*s.* were allowed as dividends accruing due to Sir Robert Rich upon funds sold; and 169*l.* 7*s.* was expended in substantial repairs on an estate purchased with part of the trust fund, and settled to the same uses as the Waverly estate, and, therefore, that the plaintiffs enjoyed the benefit of such repairs.

The cause came on to be heard the 29th of June last, before Mr. Justice Buller, sitting for Lord Chancellor, when two questions were made.

1st, With respect to the allowance for repairs and improvements.

2dly, On account of the allowance made for dividends, not accrued due on the funds, sold for the purchases; and particularly whether Mrs. Bostock was entitled to have the stock replaced, or the produce of it, which was more beneficial.

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[*] Mr. Solicitor General, Mr. Stainsby, and Mr. Simeon, contended, on the first point, that the trustees were not competent to allow any of the trust funds for the purpose of repairs or improvements, the only trust under the will being for the purchase of the real estates. With respect to the second question, the Solicitor General insisted, that, where a trustee sold out stock, if the sale proved beneficial, it should be for the benefit of the *cestui que trust*, not for his own, as it is where a trustee lays out the trust money on a personal security, if the security fails, the trustee shall suffer, but if a greater interest is made by it, the *cestui que trust* shall have it, upon this principle, that he shall have the benefit who would have been at the risque of the loss. They cited *Harrison v. Harrison*, 2 Atk. 121. and *Dawes v. Whitaker*, lately.

Mr. Mansfield, for the defendants, endeavoured, as to the latter point, to distinguish this case. As one of the trustees was likewise *cestui que trust* for life, as well as trustee, and if he had staid till the dividend day, would have received the dividend, and, therefore, was justified in taking so much upon the price of the stock as the dividend would have amounted to.

On the other point he argued, that the trustees were justified, the estate being benefited by the improvements, and having come of greater value, into the hands of defendants and Mrs. Bostock.

Mr.

Mr. Justice *Buller* was of opinion, the selling the stock a few days before the dividend became due, could not vary the case from selling a few days after the dividend; therefore the retainer of the dividend could not be allowed. When stock is sold by a trustee, contrary to the trust, the *cestui que trust* has a right to elect to have the stock restored, or the produce of it paid, as the trustee shall never make the advantage, when he could replace the stock at a less price than that at which he sold it.

With respect to the improvements, he seemed to think, that, so far as they were substantial, the trustees were justifiable, and therefore referred it to the Master to enquire what substantial and lasting improvements had been made on the purchased premises by Sir *Robert Rich*, the father of the plaintiff; and that the Master should enquire how the sums of 508*l.* 11*s.* 3*d.*, 344*l.* 14*s.* 6*d.*, 10*l.*, and 169*l.* 7*s.* were laid out, and reserved directions till the Master should have made his report.

[*] The plaintiffs presented a petition for re-hearing the cause before Lord *Chancellor*, stating themselves to be aggrieved by the decree directing an enquiry with respect to the lasting improvements, and how the monies had been laid out; and claiming to be entitled to a decree, in the first instance, for the payment of the enumerated sums, to the trustees under Field Marshal Sir *Robert Rich*'s will, and insisting that, after the purchase made and executed by Sir *Robert Rich*, it was not competent for the trustees to pay to, or allow him to retain any of those sums, for the purpose of making any improvements on the purchased estates.

The cause coming on now to be re-heard,

Mr. *Solicitor General*, Mr. *Stainsby*, and Mr. *Simeon*, argued for the plaintiff, and Mr. *Mansfield* for the defendant, to the same effect as in the former stage of the cause.

Lord *Chancellor* said, the Court would insist, under a trust of this kind, that the trust funds should be laid out in land only, not in building a house, or making improvements; that a tenant for life, with remainder to his first and other sons, remainder to his sisters, could not lay out a sum of money on the estate, and charge it on the reversion, although the estate itself would be benefited; he thought, therefore, the decree ought to be reversed, as being wrong in precedent.

With respect to the dividends, although the trustees need not have sold the stock till after the dividends were due, they could not be allowed in the price of the stock.

The decree, therefore, was reversed; and it was referred to the Master to compute interest on the several sums of 508*l.* 11*s.*, 344*l.* 14*s.* 6*d.*, 10*l.*, 169*l.* 7*s.*, and 7*l.* 15*s.* from the death of Sir *Robert Rich*, and that the same sums should be paid, by his executors, to the plaintiffs, and the principal sums to be paid by the executors to the trustees under Field Marshal Sir *Robert Rich*'s will, upon the trusts thereof, with costs, against the executors of Sir *Robert Rich* the son.

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Rolls, 28th July.

[S. C. 2 Cox,
190.]

Gift to the
children of a
deceased sister,
means those
living at the
testator's
decease. (1)

[*] VINER *against* FRANCIS.

(R. L. 1787. B. fol. 752. and 1788. B. fol. 534. b.)

On further directions.

JOHN Wigginton, by will, gave to his brother *Samuel Wigginton* 6000*l.* in trust for the use and *benefit of his children*, to be equally divided between them in his life-time, or at his death, when, and in such manner as he should judge most convenient and beneficial to them. He gave to his sister *Martha Selby* 3000*l.* the interest of which he gave to her, for her own use, during her life; and at her death he desired the principal might devolve to her son *Miles Selby*, unless she should have more children, and then the same sum to be shared equally between them: and he added, "*Item, I give unto the children of my late sister, Mary Crowson, the sum of 2000*l.* to be equally divided among them. Note, To the above three legacies, I desire 100*l.* may be paid to each, within one month after my decease, to buy mourning, &c.*" And, after giving several other legacies, *he gave all the residue*, after payment of debts and legacies; thus, "I give unto my brother *Samuel Wigginton* one-third of the residue, and one-third more to my sister *Martha Selby*, and the other third I give to the children of my late sister *Mary Crowson*, equally to be divided between the children of my brother *Samuel Wigginton*, my sister *Martha Selby*, and the children of my late sister *Mary Crowson*."

At the date of the will there were three children of *Mary Crowson's* living, viz. *John, Elizabeth, and William*. *William* died after the date of the will, in the life-time of the testator, and it was contended that one-third of the 2000*l.* given to the children of *Mary Crowson* lapsed into the residue, and one-third of one-third of the residue lapsed, and was payable to the next of kin, as undisposed of.

But the Master of the Rolls was of opinion (2), that by the words children

(1) See *Congreve v. Congreve*, ante, 1 vol. 529, &c.; *Devisme v. Mello*, ib. 557. 542. &c.; *Gilmore v. Severn*, ib. 582., and the Editor's notes upon each. It is very observable the principal case was not cited in *Martin v. Wilson*, postea, 3 vol. 324. From Lord Redesdale's MS. notes upon each of the cases. See also *Hughes v. Hughes*, post. 3 vol. 352. *Hill v. Chapman*, ibid. 391. *Northing v. Burbage*, Prec. Ch. 410. *Horsley v. Chaloner*, 2 Ves. 83. *Isaac v. Isaac*, Amb. 348.

(2) The Editor was favoured by Mr. Cox with a MS. note of his Honour's judgment, which he finds is almost verbatim the same as the judgment stated, 2 Cox, 191. As, however, it may be acceptable to have so clear an exposition of his Honour's sentiments in one connected view of the case, and as the case itself appears contra to *Martin v. Wilson*, postea, 3 vol. 324. The Editor subjoins it.

M. R.—There is no doubt in this case as to the bequest to the children of *Samuel Wigginton*, for all *Samuel Wigginton's* children were alive at the death of the testator *John Wigginton*. It was once indeed thought, that a bequest to the children of *A.* might extend to all children born at any future time; but *Devisme v. Mello* has settled that such children shall take as are born at the time the distribution of the fund was to take place. The doubt in this case arises on the clause which gives "to the children of my late sister *Mary Crowson*," the sum of 2000*l.* to be equally divided. As I said before, the general rule settled by *Devisme v. Mello* is, that the children living at the time of the distribution of the fund, shall take; if it is to be distributed at the testator's own death, then such children as shall be then alive; if distributable at the death of some other person than the testator, shall be supposed to mean such children as be then living. Then the question is, whether a gift to the children of his late sister *M. C.* is or is not indicative of an intention different from what would be imputed to him under this general rule? namely, that he meant the particular children living at the time he made his will to take the fund equally between them; and that it was the same thing as if he had given the 2000*l.* to "the three children of my late sister," for in that case it would have been a legacy to three designed persons. Now where a testator gives a fund to be divided amongst his own children, he shall be supposed to mean such children as shall be living

children of *Mary Crowson*, was meant such persons as should be children at the death of the testator, though *Mary Crowson* was dead at the date of the will, and decreed accordingly.

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at the time of his death; if so, why should I suppose that the sister being dead, he meant any thing else than what would be imputed to him in the other case. This is not like the case of *Lord Biddon v. Earl of Suffolk*, 1 P. W. 96., for there the gift is to the "five children," which shews that he had particular objects in view. But the general rule, I take it, comes to this, to exclude all children, who, though living at the time of the will, yet die before the testator; and to include all those who are living at the time of the distribution, though born after the will, or the death of the testator.

[*] *ADDERLEY against CLAVERING.*

THE testator had his own and his wife's life in a church lease; he devised this, with other estates, to his wife for life, with remainders over, but without any direction for the renewal of the church lease by adding other lives. The wife renewed the lease (1) for two additional lives, and paid for the renewal a fine of 900*l.*; and the question, on further directions, was, as to this money so paid by the wife (2), and from which she (her own life having been in the subsisting lease) would derive no benefit. (3) Lord Chancellor ordered it to be a charge on the estate (exclusive of the wife's life) with interest, from the time of its being advanced. (4)

Lincoln's Inn
Hall, 31st July.
[S. C. 2 Cox,
192.]

Money paid as a fine, by the last life in a lease, for a renewal, ordered to be a charge on the estate.

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(1) In the first instance for seven years, and paid for the renewal 59*l.* 7*s.* 5*d.* She then married the plaintiff *Ralph Adderley*, who paid 909*l.* 4*s.* for another renewal, in which two new lives were inserted. Reg. Lib.

(2) And her husband. See the preceding note, and R. L.

(3) As to the prevailing rule, that tenants for life shall contribute only in proportion to the interest actually derived by them, and the abolition of the former arbitrary practice. Vide *Pickering v. Vowles*, and *Nightingale v. Lawson*, *antea*, 1 vol. 197. 440., with the Editor's notes and reference.

(4) It was declared that the 409*l.* 4*s.* reported to have been paid by the plaintiff *R. A.*, for fine and fees on the renewal of the premises, ought to be allowed, and considered as a charge on the said testator's real estates, with interest, from the 1st day of December, 1778, being the time of advancing the same. R. L.

VERNON against VERNON.

(R. L. 1788. B. fol. 590.)

Upon further directions.

HENRY VERNON seised, as tenant in tail male, of estates in the county of *Sussex* and elsewhere, died on the 17th of *March* an infant and intestate, by which *John Vernon*, one of the plaintiffs, became tenant in tail of the estate.

Sir *John Cullum*, one of the testamentary guardians of *Henry Vernon*, had let some leases of the estates of which he was tenant in tail; but other tenants, who had not leases, continued as tenants from year to year; their rents were payable half-yearly, at *Lady-day* and *Michaelmas* in every year, which demises expired on the day of the death of *Henry Vernon*.

Lincoln's Inn
Hall, 31 July—
1 Aug.

Rent paid to receivers, by tenants holding by demises determinable upon the decease of tenant in tail (who died without issue) apportioned between the representative and remainder man. (1)

(1) Upon the subject of apportionment, in the above and other instances, vide *Hawkins v. Kelly*, 8 Ves. 308. 311, 312. *Sutton v. Chaplin*, 10 Ves. 66. *Aynley v. Wordsworth*, 2 Ves. and Beames, 331, &c., and *Bentham v. Alston*, 2 Vern. 204.

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These

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against
VERNON.

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These rents, having been paid into the hands of the receivers, the present question was, whether the administratrix of *Henry Vernon*, the deceased tenant in tail, was entitled to the proportion of the rents from *Michaelmas* to the 17th of *March*, the day of his death, or *John Vernon*, the remainder-man in tail, was entitled to the whole of the rents.

[*] The Master had reported this proportion to amount to 900*l.* 5*s.* 2½*d.* after deducting the proportion of taxes, &c. which he reported due to the said *Henry Vernon*, on the day of his death.

To this report, *John Vernon* took exceptions, for that the said Master had thereby certified that he was of opinion, and did find, that the several sums in the schedule to his report had arisen from the proportions of rent due to the said *Henry Vernon*; whereas he ought to have certified that there had not any sum arisen due to the said *Henry Vernon* on the day of his death, in regard the said *Henry Vernon* was tenant in tail of the estates of which the Master certifies the said rents or proportions to be due.

Mr. Selwyn and *Mr. Spranger*, in support of the exception to the Master's report.

As *Henry Vernon* did not live till *Lady-day*, when the half-year's rents would become due, he did not become entitled to any part of the rents.

It will be contended on the other side, that this case is within the provisions of the statute 11 Geo. 2. c. 19. s. 15. for the apportionment of rents; but that statute provides only that, where any tenant for life shall happen to die before, or on the day on which any rent was reserved, upon any demise, or lease, which determined on the death of such tenant for life, that the executors or administrators of such tenant for life, may, in an action on the case, recover from the under-tenant, the whole or a proportion of such rent, according to the time the tenant for life lived. This statute has never been held to extend to a tenant in tail dying without issue. In the case of *Paget v. Gee*, the 4th of *December*, 1753, before Lord *Hardwicke*, and which is reported in *Burn's Justice*, vol. i. title *Distress*, s. 17. p. 481.(2), tenant in tail, with remainder to the defendant in fee, leased for years, and died without issue a week before the half-year's rent became due, the tenant paid the half-year's rent to the defendant, the remainder-man: Lord *Hardwicke* decided in favour of the plaintiff, on the ground of the tenant's having paid the rent; but did not determine that a tenant in tail was within [*] the statute. As to the other point, that the tenants have paid the rents to the receiver, it must be admitted it resembles the payment of the rent to the remainder man, in the case of *Paget v. Gee*; but, as the question arises at the moment of the death of the tenant in tail, it cannot turn on any thing subsequent to that, the Court will therefore not decide on that ground, but upon the statute only; and, if it is not within the statute, though the case may be within the same mischief, will leave the case as it is, till parliament shall interfere, in this, as well as in the case of tenant for life only.

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Mr. Solicitor General, and *Mr. Hollist*, on behalf of the administratrix. — The case of *Paget v. Gee* (3) decides the present case. If there had been a lease in this case, as in that, it would be in point; but that circumstance is immaterial, as the lease would be void. Although it is not the same thing between the tenant in tail and the issue in tail, who, by taking the rent, may affirm the lease, yet it is the same thing between tenant in tail, and the remainder-man, as if the former were tenant for life only; as between tenant in tail and the remainder-man,

(2) Also Amb. 198.

(3) See per Lord *Eldon* C. in *Hawkins v. Kelly*, 8 Ves. 311, 312.

the lease is absolutely void. Bro. Abridg. title Acceptance of Rent, s. 19. says, the acceptance of rent by the remainder-man, will not affirm the lease. The same law is laid down in *Paine's* case, 8 Co. Rep. 34. Godbolt, 9.† The solid ground, in the case of *Paget v. Gee*, is that, as the remainder-man receives the rent without title, the tenant, paying it, meant to discharge the obligation he was under for his use and occupation; whereas the remainder-man gives no consideration for the rent he receives, accrued before the death of the tenant in tail: and it seems as if this ground would, in equity, entitle the executor, independently of the act, to recover against the remainder-man, to whom the tenant has paid, without any obligation, for the prior enjoyment, although it may be doubtful whether he could recover in an action for money had and received without the aid of the statute. In the case of *Lord Stafford v. Lady Wentworth*, best reported in 9 Mod. 21., where the tenant in tail died on the rent-day, it is decided, that the under-tenant having paid the rent to the remainder-man, who had received it without [*] title, it should be paid over to the representative of the tenant in tail; and in *Whitfield v. Pindar*, (in the Common Pleas, Hil. 1781.) (4) where the tenant in tail, remainder to others in tail, made a lease, and died three weeks after the rent-day, [it was determined] there should be an apportionment, though the lease was void against the remainder-man.

Lord Chancellor. — The case of *Paget v. Gee*, seems rather to be a decision what the statute ought to have done, than what it has done; but the question here seems to turn on another ground, that the tenant, holding from year to year, or from period to period, from a guardian without lease or covenant, cannot be allowed to raise an implication in his own favour, that he should hold without paying any rent to any body. (5)

Exceptions to the Master's report over-ruled.

† See also, as to this point, *Co. Lit.* 44 a. 45 b. — *Noy*, 6. — 1 *Leon*. 268.

(4) Cited 8 Ves. 311. by the Lord Chancellor.

(5) "And that the implication of law raised in the common cases did not arise between a tenant and a guardian, who had no power of leasing to bind the remainder-man." From Mr. Cox's MS. notes.

Lord Eldon C., speaking of the principal case (after having approved of Lord Hardwick's positions in *Paget v. Gee*), says, "Lord Thurlow had great doubt upon the question, and determined that where the occupier held without a lease, he should not be permitted to say it was from year to year, though his bargain was for that; but in order to give the executor a proportion, the Court would imply that the occupier was not tenant from year to year, and would consider him tenant at will; therefore neither affirming nor denying *Paget v. Gee*, and the other cases." *Vide Hawkins v. Kelly*, 8 Ves. 312.

Ex parte BOLTON School.

BY a private act of parliament for regulating *Bolton* school, the number of trustees was limited to 12, of whom 7 were to constitute a quorum; and there was a clause in the act, by which it was enacted that, if any of the constitutions or provisions in the act, should be found inconvenient or impracticable, the trustees might apply by petition to the Lord Chancellor, who might, in a summary way, vary such constitutions or provisions.

It being found impracticable to gather together so large a number as seven out of twelve trustees, insomuch that no meeting had ever been had, all the trustees except two (who consented to the application)

H h 3

applied

1789.

VERNON
against
VERNON.

[*662]

Lincoln's Inn
Hall, 1st Aug.

Summary powers given to Lord Chancellor to vary provisions relative to a trust do not extend to altering the general constitution of the trust itself.

1789.

Ex parte
Bolton
School.
[*663]

applied now to the Lord *Chancellor*, either to encrease the number of trustees to sixteen, or to make the quorum consist of five only.

But Lord *Chancellor* thought this not within his jurisdiction, which, though it might extend to varying by-laws, or particular [*] provisions, did not comprise a power to alter the general constitution of the trust itself, and therefore, that the application must be to parliament.

Lincoln's Inn
Hall, 1st August.

STEWART against HOARE.

(Reg. Lib. 1788. B. fol. 547. b.)

[Fair expenditure reimbursed under the head of just allowances, or by special order upon the same principle.]

THE solicitors, having been employed by the mother of the plaintiff, an infant, in collecting rents, which would be endangered by the delay of applying to the Court for a receiver, charged 20*l.* for their trouble in so doing. The Master, upon taking the account, did not think himself entitled to allow it under the head of just allowances, and reported the whole sum in their hands to be due. They now applied to the Lord *Chancellor*, by petition, who said he could not make the order, for fear of the precedent, as they should have applied to the Court for a receiver, who would have had his allowance; but as, if the mother had been the accounting party, and had employed an agent to collect the rents, whom she had paid, the same would have been allowed her under the head of just allowances, he would put this in the same shape, and allow the payment of the 20*l.* as a payment made by the mother. (1)

(1) The order was, that the petitioner should retain the sum of 20*l.* 1*s.* 1*d.* for poundage in collecting the rents of the estate, &c. R. L.

A trustee, or the next friend of an infant, is entitled to all fair expences beyond taxed costs, under the head of just allowances. *Fearn v. Young*, 10 Ves. 184., and in *Crump v. Baker*, 18 Ves. 285. Lord Eldon C. held that charges of a sale were to be allowed under the same head, and not under the head of costs. As to allowances for charges and trouble in the case of a receiver, as distinguished from that of an executor, see in *Potts v. Leighton*, 15 Ves. 276.

MINET against HYDE.

(Reg. Lib. 1788. B. fol. 552.)

Lincoln's Inn
Hall, 1st August.

Form of payment of wife's money to husband, when the parties are abroad. (1)
Lord Chancellor said, in future, on all applications for wife's money to be paid to husband, he should expect an affidavit that there was no settlement on the marriage. (2)

THE testator, by will, gave a sum of money to be divided among the children of *Elizabeth du Bons*. *Charlotte*, one of the daughters, being married to — *Hardy*, and living abroad at *Breda*, an application had been made that 8*l.* 6*s.* 8*d.*, her share, together with 132*l.* 5*s.* 1*d.* interest, should be paid to her husband; and it was ordered that she should appear before some of the plaintiffs, and a ma-

future, on all applications for wife's money to be paid to husband, he should expect an affidavit that there was no settlement on the marriage. (2)

(1) The above statement of the form of the order is defective. It was ordered that she should appear and be examined, &c. (as above), such examination to be in writing, either in the French or German language, and to be signed by her, and attested by notaries public; the certificate thereof to be in writing, either in the German or French language; such signing and certificate to be verified by affidavit of some credible witnesses, either in the German or French language, before a proper magistrate of *Leyden* aforesaid. And it was ordered that such examined certificate and affidavit, after the return thereof should be translated from the language in which they should be taken into the English language, by T. A. and R. R., of London, notaries public, or either of them, and that such of them as should translate the same, should be sworn to the truth of such translation. R. L.

(2) See also *Hought v. Ryley*, 2 Cox, 157.; and *Binford v. Bowden*, 2 Ves. jun. 38. gistrate

gistrate of *Breda*, to be privately examined, in the *French* or *German* language, as to her consent, and the examination attested by notaries public, and translated on oath. This being now done, and a petition presented from her and her husband, that, after deduction of costs to be paid to the solicitor, the remainder of the sum should be paid to the husband; Lord *Chancellor* said, that for [*] the future, he should expect an affidavit(3), upon such applications, that there was no settlement on the marriage; and, it being suggested, in the present case, that the settlement was before the marriage, affecting only the husband's fortune, and not this money which had come to the wife, and that they had an affidavit to that effect; the payment was ordered.

1789.

MINET
against
HYDE.

[*664]

(3) See note (2) in preceding page. The Court is still content with an affidavit of such fact, instead of subjecting the parties to the expence of a reference to the Master.



A

T A B L E

OF

PRINCIPAL MATTERS.

A.

ACCOUNT.

AN account settled 10 years before the bill filed, though containing very gross items, shall not be opened; but the plaintiff permitted to surcharge and falsify (*Brownell v. Brownell*) Page 62
 [Bill to open an account must state specific errors (*Taylor v. Haykin*) 310

ADEMPTION.

See LEGACY, REVOCATION, WILL.

AGREEMENT.

An agreement for an annuity, to be paid during the joint lives of plaintiff and his uncle, for a sum to be paid on the death of the uncle without issue, and the annuity paid during the uncle's life. Bill to set it aside dismissed (*Henley v. Axe*) 17
 [Specific performance of agreement decreed upon an offer by letter, which was forthwith accepted by another letter in reply (*Ford v. Compton*) 32]
 Previous to her marriage, a widow entered into an agreement (without seal or stamp) that her property should go to the survivor for life. She being seised of a reversion in fee (subject to an estate tail and a trust term for securing annuities, which determined in the lifetime of the husband surviving the wife) he is entitled for life in equity (*Hodsdon v. Lloyd*) 534
 Agreement, previous to marriage, that the wife shall have power to make a will, will not make

valid a will made previous to the marriage, though subsequent to the agreement *S. C.* Page 534

See BARON and FEME, DEMURRER, MARRIAGE.

ALLOWANCE

Made to a solicitor, employed by the mother of an infant, in receiving rents which were in danger of being lost, given a just allowance to the mother, supposing her the accounting party (*Stewart v. Hoare*) 663

See MAINTENANCE.

AMENDMENT.

Plaintiff amends his bill several times, he shall not pay taxed costs, but 20s. only. (Lord *Massareene v. Lindon*) 291

ANNUITY.

For the joint lives of plaintiff and his uncle, for a sum of money to be paid on the death of the uncle without issue, and the annuity paid during the uncle's life, bill to set it aside dismissed (*Henley v. Axe*) 19
 Grant of an annuity for 4 years' purchase, set aside for inadequacy of price (*Heathcote v. Paignon*) 167
 Tenant in tail, in equity, is within the exception in the annuity act 17 Geo. 3. as to the annuity being registered (*Shrapnel v. Vernon*) 268
 Grant of annuities, at 6 years' purchase, where the grantee was accountable to the grantor for the price obtained for an estate of which he was

A TABLE OF PRINCIPAL MATTERS.

was trustee to sell for payment of debts, set aside (*Fox v. Mackreth*) Page 400

See PAROL EVIDENCE.

ANSWER.

After an order that a bill be taken *pro confesso*, merely putting in an answer is not sufficient to set aside the order (*Williams v. Thompson*) 279

Where a defendant has answered all the circumstances respecting his own interest, he shall not be compelled to answer further circumstances in the bill (*Newman v. Godfree*) 332

APPOINTMENT.

See POWER, REVOCATION.

APPORTIONMENT.

See RENT, RENEWAL OF LEASES.

[APPRENTICE.]

[Bill for a return of apprentice-fee, dismissed (*Hale v. Webb*)] 78

APPROPRIATION.

Legacy left to *A.* on marriage with consent, and, till the marriage, interest to be paid at 3 *per cent.*; the executrix lays it out in the funds, and conveys it to trustees to pay the legacy, with interest at 3 *per cent.* and to pay the surplus interest to her; this is not an appropriation binding on the legatee; and, the stocks having sunk in value, the executrix's estate shall make it good (*Cooper v. Douglas*) 231

ARBITRATION.

See PLEA.

ASSETS.

Devise to sell for payment of debts, the residue to be part of the personal estate; equitable assets (*Batson v. Lindegreen*) 94

ASSETS, Admission of.

Defendant, executor of a receiver, admitted assets to pay rents received by his testator: the bill was amended, by a charge that the testator made interest. The executor not answering the amended bill, a decree was made that he should pay interest made by his testator; and on re-hearing held bound by the admission (*Foster v. Foster*) 616

B.

BANK OF ENGLAND.

The Bank, being made parties to discover what sum an executrix had transferred into her own name, ought not to be brought on to a hearing (*Williams v. Williams*) Page 87
Stock in the bank being given to *A.* for life, and afterwards to *B.* and *A.* having bought *B.*'s remainder, they joined in an application to the bank to permit a transfer; the bank refusing, a bill was filed: the bank ordered their costs (*Pearson v. The Bank of England*) 529
[*Sed query now*] *Ibid.* n.]

BANKRUPT.

A partnership debt may be proved under a separate commission (*Hodgson ex parte*) 5
S. P. (*Page ex parte*) 119
S. P. (*Flintum ex parte*) 120
Creditor of one partner, on bond for money which came to the use of the partnership, may prove against the joint or separate fund (*Clowes ex parte*) 593
Where a partnership between bankrupts commenced at different times, separate accounts of each partnership fund directed (*Martin ex parte*) 15
Bankrupt's petition for a meeting to take his surrender, he having gone abroad, where he swore he was detained by illness, dismissed, it being sworn on the other side that he was apparently well (*White ex parte*) 47
Bankrupt's petition for a meeting to take surrender, the bankrupt having been prevented from surrendering by illness, allowed (*Bould ex parte*) 49
So where bankrupt has been committed (*Graham ex parte*) 48
Petition by a creditor to stay certificate, that he might prove a debt, not accounting for not having applied before, dismissed (*Adams ex parte*) *Ibid.*
After a dividend, fresh creditors coming in shall only be paid subsequent dividends *pari passu* with those who have proved before; but if the assignees have paid other creditors differently, they must let these creditors in for the first dividend (*Long ex parte*) 20
Commissioners in the country can, on no account, take more than 20s. for each sitting (*Paget ex parte*) *Ibid.*
A commission of bankrupt having issued against a married woman, on a trading before marriage, superseded (*Mear ex parte*) 366
Money decreed to be paid to a person who became bankrupt, ordered to be paid to the assignee (the sum being small) on the petition of the bankrupt, without a supplemental bill being filed (*Setcole v. Healey*) 322
Money of the wife, is by settlement, to be lent to the husband, on bond, at 4 *per cent.* but no interest to be taken till he should decline trade, then the interest to be paid to him for life;

A TABLE OF PRINCIPAL MATTERS.

- life; remainder to the wife for life; remainder to the children. The husband becomes a bankrupt; the assignees are entitled to the interest during his life (*Stratton v. Hale*)
Page 490
- A real and personal fund was ordered to be converted into money; the produce to be paid to the wife of the bankrupt for life, without further disposition. The third part of the personal estate (which belonged to the wife as one of the next of kin) was so vested in her, on the death of the testator, as to go to the husband's assignees, and is not a new interest arising to him upon her death (*Robinson v. Taylor*) 589
- Where a bankrupt is executor, and money of his testator comes to the hands of the assignees, he shall be admitted a creditor for that money, but the dividends shall be paid into the bank, for the use of the creditors of the deceased (*Leeke ex parte*) 596
- Costs arising from the protest of bills of exchange, shall be proved, under a commission of bankruptcy, only when incurred antecedent to the act of bankruptcy (where the date of such act is ascertained) not to the issuing of the commission (*Moore ex parte*) 597
- Testator, uncle to the bankrupt, forgave him a debt of 1000*l.* on condition he should pay his sister 60*l.* a year; if he failed in punctual payment, his executrix to call in the money: this is a debt proveable under the commission (*English ex parte*) 610
- An engagement, otherwise than by endorsement, to warrant payment of a bill of exchange, will not enable the holder to prove it under a commission of bankruptcy (*Harrison ex parte*) 615
- See LEGACY.
- BARON AND FEME.
- A transaction between husband and wife, relative to the purchase, by the husband, of his wife's separate estate, but not carried into execution during their lives, shall not be so after the death of the parties: but the husband's personal estate shall be liable for rents and profits received (*Pitt v. Jackson*) 51
- A widow, before her marriage with a second husband, conveys her fortune to trustees, to her own use, the deed is valid against the second husband (*Countess of Strathmore v. Bowes*) 345
- A woman, previous to marriage, entered into an agreement that her property should belong to the survivor for life: this agreement, though without seal or stamp, will give the husband an equitable estate for life, in lands of which she was seised in reversion (*Hodsdon v. Lloyd*) 534
- It was part of the agreement that she should have power to dispose of her property, by will made after marriage: A will made previous to the marriage, though subsequent to the agreement, is revoked by the marriage. (S. C.) 534
- A feme covert having a power, by articles of separation, to dispose of her estate, her surrender of copyhold is good (*Compton v. Collinson*)
Page 377
- [A covenant by a third person to indemnify husband against his wife's debts, a good consideration *Ibid.*]
- Where a feme covert, who is abroad, is entitled to money, which she consents shall be paid to her husband, her examination and consent shall be taken by a magistrate of the place where she resides, attested by notaries, and translated on oath (*Minet v. Hyde*) 663
- In all applications for money of the wife to be paid (by consent) to the husband, an affidavit shall be made that there is no settlement on the marriage (S. C.) *Ibid.*
- [Form of certificate of consent of wife to pay money to her husband where she is abroad, 662, note.]
- See INFANT.
- BILL.
- For rent of a mine, which depended upon the measure of a stack, retained, to suffer the plaintiff to try an issue as to the quantity constituting a stack, by the custom of the country (*Geast v. Barber*) 61
- Plaintiff permitted to dismiss his own bill without costs, the defendant having destroyed the subject of the suit, and absconding, unless defendant shall find security for costs (*Knox v. Brown*) 136
- Bill to open an account, must state specific errors. (*Taylor v. Haylin*) 310
- One part-owner of a ship cannot bring a bill on behalf of himself and the other part-owners, but they must all be parties (*Moffat v. Farquharson*) 338
- For fee-farm rents, retained for a year, and plaintiff to try his right at law (*Duke of Leeds v. Corporation of New Radnor*) 338
- But such retainer held to admit the equitable right, and draw after it an account. (S. C. on appeal) 518
- When a bill is amended, though a defendant is not bound to answer, he may, if his interest is affected, and if he does not, he shall be bound by the charges (*Foster v. Foster*) 616
- See INN OF COURT. PARTIES.
- BOND.
- Heritable bond in Scotland, whether disposable by will, referred to the Master to certify the *lex loci* (*Glover v. Shothoff*) 53
- Bond, for performance of covenants to build a bridge, and the money secured being the sum actually paid, yet an injunction granted to restrain an action on the bond, and an issue *quantum damnificatus* ordered, the sum contained in the bond, being a penalty (*Erington v. Aynesley*) 341

A TABLE OF PRINCIPAL MATTERS.

C.

CASE.

His Honour sitting for Lord *Chancellor*, may direct a case to the Court of *King's Bench*, though not when sitting at the *Rolls*. (*Horton v. Whitaker*) Page 58

[CERTIFICATE.

See *BARON and FEME*.]

CHARGE.

Upon a church lease, though varied by renewals, and a bond given for the money by the owner of the lease (who did not make the charge) remains a charge on the lease, not on the personal estate of the obligor in the bond (*Billinghurst v. Walker*) 604

See *EXONERATION*. [*HEIR*] *RENTS AND PROFITS*.

CHARITY.

Where summary powers are given to Lord *Chancellor* by a private act of parliament, to make regulations for a charity, he cannot vary the foundation of the trust (*Bolton School ex parte*) 662

CHILD.

A legacy to the children of *A.* does not extend to a child in *ventre sa mere* (*Peirson v. Garnet*) 33

S. P. (*Cooper v. Forbes*) 68

But the point doubted. (Lord *Chancellor's* opinion being rather contrary) (*Clarke v. Blake*) 320

A daughter, though eldest, shall take by description as a younger child (*Peirson v. Garnet*) 33

Legacy to the children of a deceased sister, means children living at the testator's decease (*Viner v. Francis*) 658

CODICIL.

Adding a codicil, though merely of personalty, is a republication of a will (*Coppin v. Ferryhough*) 291

S. P. (*Powel v. Cleaver*) 511. 513

Where a second codicil is a mere repetition of a former (with the addition of a single legacy) the legacies are not doubled (*Coote v. Boyd*) 521

COMMISSION.

Commissioners on one side do not attend: in order to have a new commission, the affidavits must state that the party, or his agents, have not seen the depositions on the other side (*Geast v. Barber*)

Having made different returns, a new commission issued (*Corbet v. Davnant*) 252

To obtain a commission to examine witnesses

abroad, it is not necessary for the affidavit to state that the matter arose there (*Akers v. Chancy*) Page 273. and note *Ibid*.

CONDITION.

One having an estate for life, remainder to *H.* in tail, devises that estate, together with his own estate, to trustees, to the use of *H.* for life; but provided that his own estate should not be conveyed until *H.* suffers a recovery to bar remainders created by a former will, and, in default, to other uses. *H.* did acts of ownership, but never suffered a recovery: This is not a case of election, but a condition precedent, and the testator's own estate never vested in *H.* (*Roundell v. Currer*) 67

A condition of marriage, with consent of the legatee's mother, is a valid condition precedent, and not in *terrorem* only (*Scott v. Tyler*) 431

Mortgagee gives the mortgage money to the mortgagor, on condition he will give a reversionary interest in the premises to the plaintiff: The mortgagor selling the estate, shall bring the mortgage money into court, for the use of the devisees of the reversion (*Lewis v. King*) 600

[CONSIDERATION.]

[Covenant by a third person to indemnify husband against his wife's debts, a good consideration (*Compton v. Collinson*) 377]

See also *VOLUNTARY CONVEYANCE*.

CONVEYANCE

Obtained from persons uninformed of their rights, set aside, though no actual fraud (*Evans v. Llewellyn*) 150

See *VOLUNTARY CONVEYANCE*.

COPARTNERSHIP.

In a cause for an account of a copartnership, both parties being dead, a receiver shall be appointed, *secus* in the case of a surviving partner (*Philips v. Atkinson*) 272

COPYHOLD

Surrendered to the uses of, &c. passes by a will not attested according to the statute of frauds (*Carey v. Askew*) 56

But shall not pass without surrender (*Milbourne v. Milbourne*) 64

[Necessity of surrenders now dispensed with, by act 55 Geo. 3. c. 192. See p. 64. note.]

The want of a surrender of copyhold lands, devised for payment of debts, shall be supplied for creditors, although there be freeholds descended, and specifically devised (*Birby v. Bley*) 325

Copyholds

A TABLE OF PRINCIPAL MATTERS.

Copyholds will pass by the surrender of a feme covert, impowered, under deeds of separation, to dispose of her estate (*Compton v. Collinson*) Page 377

COPYRIGHT.

An author having sold his copyright, and living more than fourteen years, the resulting right for fourteen years more, under the act of Queen Anne, results to his assignee, not to himself (*Carnan v. Bowles*) 80

COSTS.

Defendant, having destroyed the subject of the suit, and absconding, shall find security for costs, or plaintiff shall be permitted to dismiss his own bill without costs (*Knox v. Brown*) 106

Application that the plaintiff, living in Ireland, should give security for costs, must be before answer (*Craig v. Bolton*) 609

See AMENDMENT, BANK, EXECUTOR, INTERPLEADER.

D.

DEBTS.

[See BARON and FEME. — CONSIDERATION.]

For the application of the real or personal fund in payment of debts,

See EXONERATION.

DEED

Valid in the first making, continues so against other parties (Countess of *Strathmore v. Bowes*) 545

DEMURRER.

There shall not be two demurrers to one bill: *secus* to original and amended bill (*Bancroft v. Wardour*) 66

Demurrer, to a bill, by next of kin and legatee in a testamentary paper (before probate or administration obtained) for an account against executors in a former bill, over-ruled (*Morgan v. Harris*) 121

[Demurrer to bill for specific performance for renewal of a lease, alleging a promise in consequence of money theretofore laid out, allowed, as *nudum pactum*: and held that money laid out afterwards would not vary it (*Robertson v. St. John*) 140

By trustee, to a bill brought by creditors, that the plaintiffs had no interest, over-ruled; the bill stating the trusts to be fulfilled (*Davidson v. Foley*) 203

After a motion for time to answer, a demurrer to part (with an answer to part) was put in,

and, upon being referred to the Master, he reported it regular, exception to the report allowed (*Kenrick v. Clayton*) Page 214

Secus of a plea *Ib.*

A bill, proper for discovery only, prays relief: a general demurrer over-ruled (*Fry v. Penn*) 281

But, afterwards, such a demurrer allowed (*Price v. James*) 319

A woman, being ensient with a child, gives a promissory note to a trustee for its benefit: This is not so clearly *nudum pactum*, that the court will allow a demurrer to a bill, by the child (when born) and the trustee, to have it performed (*Seton v. Seton*) 610

DEPOSIT.

[A person who makes a deposit on opening biddings which is laid out in the funds and becomes more profitable, is not entitled to the dividends upon it; the deposit being considered as part of the purchase-money (*Duyley v. Lady Powis*) 32]

[Made on exceptions to the Master's report, divided, if the exceptant succeeds in part, and fails in part (*Cookson v. Ellison*) 252. n.]

Of bank notes, with executors, for the children of A., is a gift among them (*Powell v. Cleaver*) 499

Of bonds of the testator, by an executrix, with bankers, as a security for her own debt. *Qu.* Whether the bankers can retain them (*Scott v. Tyler*) 431

DEVASTAVIT.

The husband of a feme covert executrix commits a devastavit, and becomes bankrupt, the wife surviving is not liable (*Beynon v. Gollins*) 323

DEVISE.

Words of request, or desire, will raise a trust where the property and the object are certain (*Peirson v. Garnet*) 38

The words were, "I give the residue to P. P. his executors, administrators, and assigns; and it is my dying request to the said P. P. that, if he shall die without issue living at his death, the said P. P. will dispose of what fortune he shall receive under this will, to and among the descendants of my late aunt A. C. in such manner and proportion as he shall think proper." This was held at the Rolls, to raise a trust for the descendants of A. C. (S. C.) 38. 226.

E. C. conveyed several sums of money to trustees, to be laid out in land, to be settled to the use of himself for life, remainder, as to the lands, to be purchased with different sums, to several of the same uses, but with different ultimate remainders: By will, he gave leasehold estates, and a mortgage, to secure annuities; the surplus interest, or the rents

A TABLE OF PRINCIPAL MATTERS.

- rents of the lands to be purchased, to be paid to *R. C.* for life, and to be settled in the same manner as his other estates. It being uncertain which of the limitations the devise was to follow, it is, as to the ultimate remainder (the intermediate uses being spent) undisposed of, and goes to the heir at law as a resulting trust (*Leslie v. Duke of Devonshire*) Page 187
- That, in case the devisee shall come into possession of the estate devised by *T.*, the trustees shall stand possessed of this estate to the use of the next person in remainder, is valid (*Nicholls v. Sheffield*) §15
- Where one devises what is not his own, giving the owner an equivalent, the owner, defeating the devise, must give up the equivalent to the devisee (*Lewis v. King*) 600
- See EXONERATION.
- DEVISE FOR PAYMENT OF DEBTS.
- If a devise for payment of debts does not provide for it in a practicable manner, it does not take the case out of the statute of fraudulent devises (*Hughes v. Doulben*) 614
- [See HEIR.]
- DONATIO *Mortis Causâ.*
- Gift of bank notes in a paper, accompanied with declarations (though not in *extremis*) a good *donatio mortis causâ* (*Hill v. Chapman*) 612
- See DEPOSIT.
- DOWER.
- Bill filed by a widow against the heir of her husband for dower; the bill was retained for a year, to try her title at law, and a writ of dower brought; before issue joined, the heir died: the widow established her right against his devisee: the widow dying, her representative filed a bill of revivor and supplement against the executor and devisee of the heir, for a third part of mesne profits during the life of the widow, which was decreed; and the decree affirmed on re-hearing (*Curtis v. Curtis*) 620
- E.
- ELECTION.
- [Heir not put to election by a will void as to freehold estates (*Carey v. Askew*) 58]
- The testator had, by settlement, reserved an election of conveying certain parcels, or paying a certain sum; not having elected during his life, and the personalty being inadequate to payment of debts, the estate shall be conveyed (*Tyssen v. Benyon*) 5
- Children, to whom an estate descends from the mother, which had been contracted to be sold to her husband, shall elect between it and their claims under his will (*Pitt v. Jackson*) Page 51
- See DEVISE LAND.
- EQUITY.
- [Bill for a return of apprentice-fee, dismissed (*Hale v. Webb*) 72]
- Will relieve against a contract become impossible to be performed (*Smith v. Morris*) 311
- The Court will not interfere, even to secure the fund, upon the application of a person who does not shew any interest (*Brown v. Dudbridge*) 331
- See DEMURRER.
- ESTATE.
- A term being settled upon the husband for life, remainder to the wife, her executors, administrators, &c. for the residue of the term, for her jointure, and for the better settling the term on her, for life, for her jointure, a covenant to renew and insert her name. The addition of these words will not reduce it to an estate for life (*Clarke v. Hackwell*) 304
- See EXONERATION.
- EVIDENCE *Parol*
- Of a parent's intention that a portion should not be a performance of a legacy, admitted (*Debeze v. Mann*) 165, 519
- That it was part of an agreement for an annuity, that it should be redeemable, refused (*Portmore v. Morris*) 219
- [Extrinsic evidence to shew that testator's own estate was insufficient for the purposes of his will, rejected (*Andrews v. Emmot*) 297]
- Admitted, to shew that legacies given by a second codicil were intended as accumulative (*Coote v. Boyd*) 521
- EXCEPTION.
- Where an exception is taken to an answer, the defendant cannot protect himself, by saying that he is a mere witness; but he should have availed himself of that by plea or demurrer; having submitted to answer, he must answer fully (*Cookson v. Ellison*) 552
- [Where an exceptant to the Master's report succeeds in part, and fails in part, the deposit is divided *Id. n.*]
- And see *Dawson v. Busk*, 2 Madd. Rep. 184., &c.]
- EXECUTION.
- One being in execution for costs, a demand of a higher nature, upon the plaintiff, arises to him

A TABLE OF PRINCIPAL MATTERS.

him as executor, the Court will not discharge him on motion (*Holworthy v. Allen*) Page 17

EXECUTOR.

- Appointing one a trustee as well as executor, shall not bar his taking an undisposed residue (*Batley v. Windle*) 31
- But where the testatrix, by will, made the defendants trustees, and gave them legacies, and, by codicil, appointed them executors, and ordered them to be paid for journeys and expences, this shews an intention to make them executors in trust only (*Dean v. Dalton*) 634
- Having an annuity of 3*l.* for collecting rents, turns the executor into a trustee (*Lousop v. Copeland*) 156
- But where there are several executors, some of them having legacies, does not turn them into trustees (*Frewin v. Relfe*) 220
- Testatrix, having appointed three executors, makes a codicil, revoking the appointment of one of them, and appoints two persons executors in her room; by another codicil, she revokes the appointment of the former revoked executrix, and appoints a third person in her room; they are all executors (*S. C.*) 220
- Executors, taking a residue as executors, are joint-tenants (*S. C.*) *Ib.*
- Executors joining in a draft for the property of the testator, and suffering the money to be in the hands of a tradesman, are both liable to the loss, though one has done no other act in execution of the will (*Sadler v. Hobbs*) 114
- Not having brought an action on a bond, charged with the same (*Louison v. Copeland*) 156
- Having put the next of kin to prove their relationship, shall pay the costs of so doing (*S. C.*) *Ib.*
- Shall make good a legacy not well appropriated (*Cooper v. Douglas*) 231
- A bankrupt, being executor, and the assets of his testator being in the hands of his assignees, admitted to prove, as a creditor, to the amount, and the dividends ordered to be paid into the bank, to the use of the testator's creditors (*Leeke ex parte*) 596
- Executors to put out money at such interest as shall seem reasonable, if they lend it at 4 per cent. they shall pay the costs of the account (*Forbes v. Ross*) 430
- As to executor paying *his own* debt by a sale or pledge of his testator's estate (*Scott v. Tyler*) 431

EXECUTORY DEVISE.

Gift to testator's brother, without restriction as to his children, to whom he shall leave, before or after his death, such part of the testator's inheritance as their conduct shall deserve; but if at the death of his brother there shall be no children, then to A. this is an executory devise, which, if it took place,

would defeat the interest of the children of the brother (*Lieutaud v. Agassiz*) Page 615

EXONERATION.

- Personal estate shall not exonerate the real of a debt, not contracted by the party (*Earl of Tankerville v. Fawcett*) 57
- Estate devised to be sold for the payment of debts, the residue to be added to his personal estate, decreed that the personal estate shall not exonerate the real (*Webb v. Jones*) 40
- A. purchased an estate, subject to a mortgage, the personal estate shall not exonerate the real of the mortgage debt, though the purchaser has given a fresh security (*Tweddel v. Tweddel*) 101. 152
- Although, generally, a descended estate shall be applied in exoneration of a devised estate (though under a charge for payment of debts) yet it shall not be so, if the devised estate be, expressly, pointed out in aid of another fund provided for that purpose (*Donne v. Lewis*) 257
- The personal estate, given to the next of kin, must be applied in discharge of the testator's mortgage (not being expressly exempted) though it will be thereby exhausted (*Philips v. Philips*) 272
- There being a provision in a settlement of 5000*l.* for a younger child at 21, the father, by will, added 5000*l.* more, and charged all on a residuary real fund, which he had also made liable to debts and legacies, in aid of his personal estate; the charged estate shall not be exonerated by the personal (*Ward v. Lord Dudley*) 316
- A sum of money being charged on a church lease, though the old lease was gone by renewals, and all the lives at the time of the charge expired, and a bond had been given by the owner of the lease, continues a charge on the estate, not a personal debt of the obligor in the bond (*Billinghurst v. Walker*) 604

F.

FEE-FARM RENTS.

See BILL.

FINE.

Two sisters, having estates tail descended from the mother, and the remainder in fee by descent from the brother, one levies a fine: a case was sent, by the Master of the Rolls to the Common Pleas, upon the question, Whether she acquired a fee-simple in any, and what parts of the estate (*Church v. Edwards*) 180

FINE FOR RENEWAL OF LEASES.

A. having given his freehold, leasehold, and personal property (the leasehold being bishop's leases renewable, and ordered to be renewed) to B. for life, with remainders over: the fines are to be paid out of the accumulated

A TABLE OF PRINCIPAL MATTERS.

cumulated fund, not apportioned between the tenant for life and the remainder-man (*Stone v. Theed*) Page 243
 Money paid as a fine, by the last life in a lease for a renewal, ordered to be a charge on the estate (*Adderley v. Clavering*) 659

FRAUD.

Conveyance, obtained from persons unacquainted with their rights, though without actual fraud, set aside (*Evans v. Llewellyn*) 150
 If the plaintiff releases the principal in a fraud, he cannot proceed against those who would be secondarily liable (*Thompson v. Harrison*) 164
 Inadequacy of price a badge of fraud, upon which a contract shall be set aside (*Heathcote v. Paignon*) 167
 Bill to carry into execution a parol agreement between solicitors, that there should be a degree of foreclosure, that the estate should be sold, the mortgagee paid her principal money and interest, the remainder to the mortgagor, dismissed at the Rolls, as within the statute of frauds: on an appeal, evidence of the agreement read, and the decree affirmed (*Cox v. Peele*) 334
 Plea of the statute of frauds allowed, the agreement not being in writing, though a parol agreement was confessed by the answer (*Whitchurch v. Bevis*) 559

FRAUDULENT CONVEYANCE.

Settlement, after marriage, by a person not indebted, is not within the statute of fraudulent conveyances (*Stephens v. Oliver*) 90
 So, of a deed of separation, the trustees indemnifying the husband against wife's future debts (*S. C.*) 1b.
 But a settlement after marriage, being voluntary, is fraudulent against a purchaser (*Evelyn v. Templar*) 148

G.

GUARDIAN.

[Although a stranger cannot appoint a guardian to a child during its father's life-time, the court will take care that it is educated agreeably to its expectancies; and will controul the parent in any unreasonable exercise of his authority. It will even remove a father from the guardianship in case of palpable abuse (*Powell v. Cleaver*) 499 and *Ibid.* (*Cruise v. Hunter*) 300. note]
 If a father, by will, appoints guardians to his natural child, the court will appoint them guardians, without a reference to the Master (*Ward v. St. Paul*) 583

H

HEIR.

[Estate devised away from the heir, and charged with payment of debts, ordered to be sold in aid of the personal estate, where the devisee was insane and the heir abroad] (*Williams v. Whingates*) Page 399
 Where an estate is given in mortmain, to uses which were good at the time of the gift, but became void afterwards, the heir is disinherited (*Attorney General v. Green*) 492

I.

[INCUMBRANCES.]

[Tenant for life bound to keep down the interest of incumbrances (*Tracey v. Lady Hereford*) 128]

INFANT.

See GUARDIAN.

[Infant *en ventre sa mere* shall take under the description of a child living at the death of its father (*Clarke v. Blake*) 320]
 An infant trustee ordered to convey, though the estate was abroad (*Prosser ex parte*) 325
 A male infant marries an adult female, who, by settlement, covenants that her estate shall be settled to certain uses, he is bound by her covenant (*Slocombe v. Glubb*) 545

INJUNCTION.

Under the forfeiting act in America, the estates of loyalists were to be sold for payment of debts; this is no ground for an injunction to restrain an action here on a bond (*Kempe v. Antill*) 11
 [No injunction after a verdict at law, unless the plaintiff bring the money into court (*Acton v. Market*) 14]
 An injunction shall go to restrain the defendant from injuring fish ponds (*Earl Bathurst v. Burden*) 64
 [The court also in this case restrained the tenant from building so as to interrupt his landlord's prospect. The decision, however, seems wrong 64 & note.]
 An injunction shall go to prevent printing part of a book (*Carnan v. Bowles*) 80
 Injunction to stay waste, will go to prevent tenant for life, without impeachment of waste, from improper waste: but, the answer denying any intention of cutting young or ornamental trees, the order dissolved, though the original affidavits were read against the answer (*Countess of Strathmore v. Bowes*) 88
 Injunction to stay the representative of a mortgagee (after foreclosure and sale of the premises)

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nises) from going on at law for unsatisfied mortgage money, refused (*Tooke v. Hartley*)
Page 125
 Bill filed for injunction (after verdict at law) which is obtained for want of an answer, the plaintiff shall bring the money, recovered against him, into court, upon application of the defendant, on oath, denying the equity of the bill, or the injunction shall be dissolved (*Acton v. Market*) 14
 S. P. (*Culley v. Hickling*) 182
 Injunction granted to restrain an action, on a bond for performance of covenants to build a bridge, and an issue *quantum damnificatus* ordered, the sum mentioned in the bond, being a penalty (*Errington v. Aynesley*) 341
 Injunction to stay waste, granted against the widow of a rector, at the suit of the patroness, during vacancy (*Hoskins v. Fetherstone*) 552
 Where the defendant (who has brought ejectments at law) is abroad, motion for an injunction to stay trial, must be on special ground (*Revett v. Braham*) 640

INN OF COURT.

Bill will not lie against the benchers of an inn of court relative to a grant of chambers (*Cunningham v. Wegg*) 241

INTEREST.

[See INCUMBRANCES.]

Not allowed on an account taken in *India*, and not settled by the parties, but, with difficulty, by a third person (*Boddam v. Ryley*) 2
 Giving the interest of a legacy, to the legatee, or for his use, vests the legacy (*Heath v. Heath*) 3
 A trustee, in a will which directs money to be laid out at the best interest, keeps it, with the co-trustee's consent, at 4 per cent. ordered to pay 5 per cent. (*Forbes v. Ross*) 430

INTERPLEADER.

Tenants filing the bill, and bringing rents into court, to be admitted to deduct their costs (*Aldrich v. Thompson*) 149

INTERROGATORIES

Exhibited of course to falsify an examination *pro interesse suo* (*Rowley v. Ridley*) 15

JOINTENANTS.

Settlement to permit *all and every* the children to take rents and profits to *them and their heirs* for ever; they are jointenants (*Stratton v. Best*) 233

JUDGMENT

Having been signed *in error*, for want of an original writ; there having been a petition and order for one, but the order not served, the defendants ordered to consent to set it aside; but a commitment for contempt in entering it up, refused (*Pengree v. Jonas*) 141
 A judgment having been obtained at law, though for an usurious debt, the creditor must stand as a judgment creditor for the money actually advanced, and legal interest (*Scott v. Nesbit*)
Page 641

JURISDICTION.

See BILL, INN OF COURT.

[The Lord Mayor's court having directed the indentures of an apprentice to be cancelled, but determined nothing as to the return of the fee, a bill for its return dismissed (*Hale v. Webb*) 78]

See RESULTING TRUST.

L.

LAND.

Money being ordered to be laid out in land, an infant cannot elect to take it as money, or devise or bequeath it either as land or money (*Carr v. Ellison*) 56
 Money on mortgage ordered to be laid out in land, shall be considered as land (*Leslie v. Duke of Devonshire*) 189

LEASE.

Covenant in a lease to renew on the same covenants, does not include the covenant of renewal (*Tritton v. Foote*) 636

See FINE FOR RENEWAL, WILL.

LEGACY.

Legacies being given in stock, then others without that addition, then others with a direction to sell stock, makes them all stock-legacies (*Danvers v. Maning*) 18
 Legacy of a specific sum, as a residue, but miscalculated; the residue, being larger, shall pass. (*S. C.*) *ibid.*
 So of a debt, the debt being mistaken, the actual debt shall pass. (*Williams v. Williams*) 87
 Bequest that a legacy shall pertain to *B.* after the death of *A.* without lawful issue, too remote, and vests absolutely in *A.* (*Glover v. Strothoff*) 33
 No fund being provided for legacies, they shall be in the currency of the country where given (*Pearson v. Garnet*) 58
Legacy

A TABLE OF PRINCIPAL MATTERS.

Legacy to a child, shall be laid out, and shall bear interest (*Carey v. Askeu*) Page 58
 Legacy to be paid from a farm, when A.'s son should attain 21; the farm not being carried on, the legacy falls, and shall not be paid out of the residue (*Mayet v. Mayet*) 135
 A larger legacy given to the same legatee in the same will, after a less, he shall take both (*Curry v. Pile*) 225
 Words of desire, in a will, raise a trust (*Peirson v. Garnet*) 226

LEGACIES (*who shall take*).

Legacy to the two daughters of A.; A. has three daughters, they shall all take (*Stebbing v. Walkey*) 85
 To first and second cousins shall extend, to a first cousin once removed, and to a great niece (*Mayet v. Mayet*) 125
 To the children of a deceased sister, shall be only to the children living at the testator's death (*Viner v. Francis*) 658
 To the children of A. shall not extend to a child *in ventre sa mere* (*Cooper v. Forbes*) 63

LEGACIES *vested*.

See INFANT (*in ventre*).

Gift to the executor to pay the income to the testator's mother, and after her decease, "I then give a legacy to A., the residue to B., with a power to dispose of it by will." A.'s legacy is *vested*, notwithstanding the last clause (*Benyon v. Maddison*) 75
 Legacy to A. payable at 21, or marriage, with interest, is a vested legacy, and the executor having become a bankrupt, might have been proved under his commission; his certificate is therefore a bar to the recovery against him, and the residuary legatees are not liable (*Walcot v. Hall*) 305

LEGACIES (*too remote*).

See LIMITATION OVER.

LIEN.

A. purchases an estate of B. without notice of a rent charge, the vendor covenanting that there are no incumbrances; the purchase-money is laid out in the funds; and B. afterwards sells the dividends for his life, secured by letters of attorney, to C. who has no notice; A. is evicted by the grantee of the rent charge. He has no *lien* on the funds purchased against C. (*Cator v. The Earl of Pembroke*) 282

LIMITATION.

The first use being void, *Quere*, Whether the subsequent uses are made void, or their com-

ing into possession is accelerated (*Robinson v. Hardcastle*) Page 22

LIMITATION *over*.

Gift of the interest of a sum of money to A. for life, at his death, to *devolve to the heirs of his body*, is too remote (*Robinson v. Fitzherbert*) 127
 The words "if he shall happen to die without issue," may be so construed by the context of the will, as to mean *children*; and in that case the remainder over will not be too remote (*Attorney General v. Bayley*) 533
 Testator gave the accumulation of rents and profits, till A. should attain 21, to be laid out, and the trustees to permit A. to receive the interest during his life; then he gives the money to the issue male of A. and in default, to those whom the plaintiffs represented: The issue male of A. would have taken as purchasers, therefore the limitation is not too remote (*Knight v. Ellis*) 570

M.

MAINTENANCE.

No allowance can be made to a parent, for the maintenance of his child for the time past (*Hill v. Chapman*) 231

MARRIAGE.

The testator, among other provisions, gave to a putative daughter 10,000*l.* in several events: one moiety at 21, in case she should be then unmarried, the other moiety at 25, if then married; but if she married before 21, with consent of her mother, then the whole to be paid to her, or settled to her use; but if she should die before 25, the 10,000*l.* was given to the mother, to whom there was also a gift of the residue generally: The daughter married under 21, without consent: She does not come within the description to which the gift attached; it is therefore void, and the 10,000*l.* sinks into the residue, given generally to the mother (*Scott v. Tyler*) 431
 And it seems such restrictions are not merely *in terrorem*, but, if reasonable and precedent to the vesting of the property, are valid (S. C.) *ibid.*
 Marriage is a revocation of the will of a woman, though made immediately before the marriage, in execution of a power reserved by articles, by which she was enabled to dispose of her property, by will, after marriage (*Hodsdon v. Lloyd*) 534

[MAYOR'S COURT.

See JURISDICTION.]

MODUS.

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MODUS.

Although a *modus* be set up, there must be the same notice given to determine a composition for tythes, as between landlord and tenant (*Bishop v. Chichester*) Page 161
A *modus* of 3*d.* for a lamb is so rank, that the court will not send it to an issue (S. C.) *ibid.*

MONEY

To be paid to parties, under a private act of parliament, on petition; Lord Chancellor would not order it to be paid to persons deriving title under them, without a bill (*King ex parte*) 158
Deposited upon opening a bidding, when the purchase is confirmed, is part of the purchase-money, and if the stock rises, it is for the benefit of the seller, not a bare pledge (*D'Oyley v. Countess of Powis*) 32

MONEY (*to be brought into Court*).

See INJUNCTION.

MONEY (*to be laid out in Land*).

See LAND, SPECIFIC PERFORMANCE.

MORTGAGE.

[A receiver will be appointed of mortgaged estates "without prejudice to prior incumbrancers," if the prior incumbrancers will not take possession 92. 93. and the Editor's note.]
After foreclosure and sale, the mortgagee may bring an action for the residue (*Tooke v. Hartley*) 125
Where the personalty is deficient, and the same person is heir and executor, the mortgagee may pray a sale in the first instance (*Daniel v. Skipwith*) 155
If a mortgagee admits having no other title, it shall bind him, and the court will let in the mortgagor to redeem after 20 years; not so if he claims by better title (*Perry v. Marston*) 391
Testator having a debt secured upon land, gives the mortgage money to the mortgagor, and desires that he will give a reversionary interest in the premises to A. The mortgagor selling the estate, shall bring the mortgage money into court, for the use of the devisee of the reversion, subject to the life estate (*Lewis v. King*) 600
Mortgagee of a reversion (not having the title deeds) shall not be postponed to a subsequent mortgagee (whose mortgage was made after the mortgagor came into possession) who had the title deeds; there being neither fraud nor gross negligence (*Tourle v. Rand*) 650

MORTMAIN.

Devise of freehold houses, to eight poor persons of a parish; the gift being void by the statute of mortmain, a personal fund attached to the real is also void, and the court will not apply the gift to any other purpose (*Attorney General v. Goulding*) Page 498
Devise of estates to trustees, for the use of University College, Oxford, to buy advowsons: the college having obtained, since the gift, as many as are allowed by the act, the devise is to be performed by the exchange of advowsons, or otherwise, *cy pres.* The heir at law being disinherited, where the gift is good at the time of making the will (*Attorney General v. Green*) 493

N.

NOTE, Promissory

Given by a mother to a trustee, for the benefit of a child of which she is enant, is not sufficiently *nudum pactum* for the court to allow a demurrer to a bill by the child (when born) and trustee, to have it carried into execution (*Seton v. Seton*) 610

NOTICE.

Assignee of a mortgagee, through assignments from persons not having notice of a defect in the title, not bound to discover whether he had personal notice (*Sweet v. Southcote*) 66
Where the bill states circumstances of notice, a plea of purchase without notice, alone is not sufficient, but must deny the circumstances (*Newman v. Wallis*) 143
Mortgagee of a lease, which recited the surrender of a former lease, which was upon the surrender of a former, in which the plaintiff's title appeared, held to have notice of the title (*Coppin v. Fernyhough*) 291
A person making a false representation, through mistake, but where he might, from deeds in his possession, have had notice of the truth, bound by the representation (*Pearson v. Morgan*) 384*
Quere, Whether a trustee, having prepared a deed of appointment under a power, but not knowing of the execution of the deed, shall be presumed to have such notice, as to affect him in respect of his payment of the money to a legatee, under a subsequent will of the person who had the power (*Cothay v. Sydenham*) 391
Notice to determine a composition for tythes, must be the same as between landlord and tenant (*Bishop v. Chichester*) 161

See VOLUNTARY CONVEYANCE.

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P.

PARTIES.

Bill by second mortgagee, to redeem the first mortgage, the mortgagor, or his heir, must be a party: the heir being abroad, the court cannot proceed (*Fell v. Brown*) Page 276
Where a trustee has assigned his trust, the assignee must be a party (*Burt v. Dennet*) 225
In an information to apply money, given to a charity, to other uses than those specified by the will: where there is a residuary gift to trustees for other charitable uses, the trustees and the heir, though disinherited, must be parties (*Attorney General v. Green*) 495

PARTNER.

See BILL, PLEA, COPARTNERSHIP.

PAUPER.

Plaintiff suing in form *pauperis*, shall not amend by leaving out defendants, without paying their costs (*Wilkinson v. Belsher*) 272
The affidavit, to ground the order to be admitted to sue in form *pauperis*, must be made by the party, not by a third person (S. C.) *ibid.*

PERFORMANCE, Specific.

See SPECIFIC PERFORMANCE.

PERFORMANCE of a Legacy.

See SATISFACTION.

PERSONAL ESTATE.

See EXONERATION.

PLANTATIONS.

See TRUSTEE.

PLEA.

Plea of matter which would be a good plea to the action at law, not a plea here in bar of discovery (*Hindman v. Taylor*) 7
Plea that the plaintiff is not heir, where he had deduced his title as such, is bad: the title ought to be denied as explicitly as it is laid (*Newman v. Wallis*) 143
So of plea of purchase, without notice (S. C.) *ibid.*
A plea may be amended, where there is a slip, if the material ground of defence appears sufficient, but not otherwise (S. C.) *ibid.*
Plea that *Gray's Inn* is a voluntary society, governed by benchers, subject to appeal to the

judges, a good plea to a bill, relative to the renewal of a lease of chambers (*Cunningham v. Wegg*) Page 241

Plea of conveyance, and of fine and non-claim, is not multifarious, but a good plea, to a bill impeaching the conveyance, as not being for valuable consideration (*Doble v. Cridland*) 274

Plea to a bill for an account of a partnership, that all matters in controversy were to be determined by arbitration, allowed (*Halfhide v. Fenning*) 336

Plea of the statute of frauds, the agreement not being in writing, allowed, though a parol agreement was confessed in the answer. (*Whitchurch v. Bevis*) 559

POWER.

A power, to divide among children, is not well executed by giving to one of them for life, with remainder to his sons in tail (*Robinson v. Hardcastle*) 22. 344

S. P. but that the property shall go *cy pres*. (*Pitt v. Jackson*) 51

Testator having a power over 3000*l.* originally the property of his wife, gave several legacies, and then (after the decease of his wife) gave the residue to the defendant: his estate was not sufficient to pay the legacies; yet held that the will is not an execution of the power, the same not being referred to, nor any thing by which an intention appeared in the testator to execute it (*Andrews v. Emmot*) 297

A feme covert having a power to dispose of 300*l.* by will, signed and sealed by her, made a testamentary paper, not sealed, but *on a stamp*; this is equivalent to sealing, and is a good execution of the power (*Sprange v. Barnard*) 585

Where there is a power to dispose among children, and there is only one child, the property vests in such child without appointment (*Madoc v. Jackson*) 588

See PROBATE, WILL.

PRINCIPAL.

The principal in a fraud being released, the plaintiff cannot proceed against those who would be secondarily liable. (*Thompson v. Harrison*) 164

The obligee in a bond giving further time to the principal debtor, releases the surety. (*Nisbet v. Smith*) 579

PROBATE.

Where a feme covert disposes by will, it is necessary to produce the probate to justify payment of the money (*Colthay v. Sydenham*) 391

PROCESS.

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PROCESS.

Where the defendant has appeared to, and answered the original bill, if he cannot be found to be served with a subpoena to answer the bill of revivor, plaintiff must proceed under the act 5 Geo. 2. to have the bill taken *pro confesso* (*Henderson v. Meggs*) Page 127
After *cepi corpus* returned, the plaintiff cannot move that the sheriff may bring in the body but for a messenger, and afterwards for a serjeant at arms (*Wilkinson v. Belcher*) 181

PURCHASE.

See SETTLEMENT.

PURCHASER.

One purchaser substituted for another, upon motion and consent (*Mathews v. Stubbs*) 391

See VOLUNTARY CONVEYANCE.

R.

REAL and PERSONAL ESTATE.

See TRUST, resulting.

RECEIVER.

[A Receiver will be appointed of estates in mortgage, if the mortgagee will not take possession; but still "without prejudice to his rights." 92, 93, and the editor's note.]
Motion for a receiver, granted before answer (*Van v. Barnet*) 158
The Master's report of his approbation of a receiver, must stand till the person is impeached as improper (*Creuzé v. Bishop of London*) 253
In a cause for an account of a partnership, both parties being dead, a receiver shall be appointed; *secus*, if one be surviving (*Philips v. Atkinson*) 272
Ought not to keep money arising from receipts in his hands; if he does, he or his executors shall pay interest. (*Foster v. Foster*) 616

REFERENCE FOR IMPERTINENCE.

A defendant to a bill, though not served with process, may appear *gratis*, and refer it for impertinence. (*Fell v. Christ's College, Cambridge.*) 279

REMAINDER, over.

See LIMITATION, over.

RENT.

Apportioned between the representative of tenant in tail, who died without issue, and the remainder-man in tail (*Vernon v. Vernon*) Page 659

RENT, *Fee-Farm*.

See BILL.

RENTS AND PROFITS.

An estate being settled to A. for life: then, as to part, to B. for life: remainder, as to the whole, to uses under which the defendant takes as tenant for life, with power to A. to charge (but not encumber B.'s estate for life) the estate given in remainder falls in during B.'s life, and the interest of the charge exhausts the rents and profits: upon B.'s life estate falling in, the rents and profits of that estate shall go to pay the arrears, which shall be a charge upon the inheritance. (*Tresny v. The Countess Dowager of Hereford*) 128

REPUBLICATION.

A codicil, though made for the purpose of passing after-purchased estate, is a republication of a will (*Coppin v. Fernyhouse*) 391
So, though of personalty only, it is a republication of a will of lands (*Powel v. Cleaver*) 511, 513

REVOCATION.

A codicil, revoking a legacy of 40,000l. The legacy was but 30,000l. the other 10,000l was an appointment under a power; this is a revocation of the appointment (*Pitt v. Jackson*) 51
Marriage of a testator with a legatee, is not a revocation of the legacy (*Eubank v. Halliwell*) 514
Secus of marriage and a settlement. 514
A feme covert makes a will; becoming discover, she takes a conveyance from the trustees; this is a revocation (*Lawrence v. Wallis*) 519

See ADEMPION, WILL.

S.

SALE OF LANDS.

When a will directs, and a decree orders a sale of lands, or so much thereof as shall be necessary to pay incumbrances, and the Master, by consent of the parties interested, sells the whole; it is no objection on the part of the purchaser, that more is sold than will pay the incumbrances (*Ludwyck v. Winford*) 248
Where an estate is devised, charged for the payment

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payment of debts, the court will order a sale although the heir be abroad, and the devisee insane (*Williams v. Whynates*) Page 399

SATISFACTION.

Proviso in a settlement, that the wife shall not be barred from any thing the husband shall give or leave: he dies intestate, and a freeman of London: her share by the statute and custom are not a satisfaction of the covenant (*Kirkman v. Kirkman*) 95

Parent paying a portion, is presumed to mean to perform the gift of a legacy, unless there be sufficient evidence to repel the presumption (*Ellison v. Cookson*) 397

But the father of a putative daughter paying a portion on her marriage, accompanied with a declaration that she would have more at his death, is not a satisfaction (*Debeze v. Mann*) 165. 519

Such an advancement of a legatee by a stranger not a satisfaction or performance of the legacy (*Powel v. Cleaver*) 499

By settlement, daughters were to have 2000l. each: the father, by codicil to his will, gives them 20,000l. This was held a cumulative provision, and not a satisfaction of the settlement (*Hanbury v. Hanbury*) 352. 529

A bond for payment of 10,000l. each by the brother, not held a satisfaction for their claims under the settlement (S. C.) *ibid.*

By marriage settlement of the father and mother, 8000l. was settled on younger children: there being but one younger son, the father, by his will, left him the residue (which amounted to a much larger sum) it is a satisfaction (*Rickman v. Morgan*) 394

SETTLEMENT.

Settlement after marriage, by a person not indebted, is not within the statute of fraudulent conveyances (*Stephens v. Oliver*) 90

Purchases were to be made with the trust money, but no time limited for making them; the husband made a purchase, but directed it not to be to the uses: it shall not be applied to them; but the personal estate is liable for the breach of contract (*Pitt v. Jackson*) 51

SPECIFIC PERFORMANCE.

Contract for purchase in lots; no title can be made to two of the lots, and others had been deteriorated: If the former were not so blended with the others, as to injure them, a specific performance shall be decreed (*Poole v. Shergold*) 118

Promise, by letter, to renew a lease in consideration of money already laid out by the tenant, is *nudum pactum*, and no specific performance will be decreed; nor is it varied by money having been laid out afterwards (*Robertson v. St. John*) 140

At a sale by auction, the seller's agent bid for the purchaser, a specific performance refused (*Turning v. Morrice*) Page 396

STAMP DUTIES.

An original letter, stamped after production, will make it evidence (*Ford v. Compton*) 32
If the terms of a contract are reduced into writing, the paper must be stamped, in order to make it evidence (*Hearne v. James*) 309

STOCK.

Where stock in trust for A. for life, with remainders over, is sold out just before a dividend, to which A. would be entitled, he can have no allowance, in the price, for the dividend which would have become due, if the stocks had not been sold (*Bostock v. Blake-ney*) 653

Where a trustee sells stock improperly, the cestuique trust has his election to have the stock replaced, or the produce (S. C.) *ibid.*

SURETY.

Where principal and surety are bound in a bond, if the creditor gives the principal further time for payment, he releases the surety (*Nisbet v. Smith*) 579

SURRENDER.

See COPYHOLD.

T.

TENANT in Common.

See JOINTENANT.

TENANT in Tail,

See APPORTIONMENT OF RENT.

TRUST AND TRUSTEE.

Bill against a trustee, who has assigned his trust, the assignee must be a party, as the decree must be first against him, and the original trustee to stand as a security (*Burt v. Den-net*) 225

Infant trustee directed to convey the trust estate though abroad (*Prosser ex parte*) 525

A trustee for the sale of estates for payment of debts, who purchased them himself, by taking undue advantage of the confidence reposed in him, by the vendor, and, previous to the completion of the purchase, sold them at an highly advanced price, decreed to be a trustee for the original vendor as to the sums produced by the second sale (*For v. Mackreth*) 400

A trustee

A TABLE OF PRINCIPAL MATTERS.

A trustee in a will which directed money to be lent at the best *interest*, by consent of his co-trustee, keeps it at 4 *per cent.* decreed to pay 5 *per cent.* interest (*Forbes v. Ross*) Page 430
 A trust fund created by will to be laid out in the purchase of lands, no part of it shall be laid out in repairs or improvements of the purchased estate (*Bostock v. Blakeney*) 653
 Where the trustee sells out stock improperly, the *cestui que trust* may elect whether he will have the stock replaced, or the produce of it (S. C.) *ibid.*
 A trust may be raised in a will by words of desire (*Pearson v. Garnet*) 38. 226

TRUST, *resulting.*

The testator gave to trustees for terms, remainder to *A.* and *B.* for life: the trusts of the terms were to pay scheduled debts of *A.* and *B.* and to make them an allowance; the debts being stated to be paid, a trust results to *A.* and *B.*: *A.* demurrer by the trustees against creditors as having no interest was therefore over-ruled (*Davidson v. Foley*) 203
 Real and personal estate being given to trustees to be sold and converted into personalty, the trustees to pay the produce to *A.* for life, without further disposition; the residue does not go to the trustees as undisposed of (though made executors, and one of them had a legacy,) but is a resulting trust for the heir, for so much as was the produce of the real estate, and, as to the personal for the next of kin (*Robinson v. Taylor*) 589

TYTHE.

See *MODUS.*

U.

UNCERTAINTY.

A devise void for uncertainty (*Leslie v. D. of Devonshire*) 187

USURY.

See *JUDGMENT.*

V.

VESTED LEGACY.

See *LEGACY VESTED.*

VOLUNTARY CONVEYANCE.

A. by settlement after marriage conveys to trustees to family uses, reserving a power to sell,

but covenanting that the money shall be paid to the trustees for the same uses; *A.* sells to *B.* who has notice of the covenant, and pays the money to *A.*, *B.*'s representative shall not be obliged to pay the purchase money over again to the trustees to the uses of the settlement, which being voluntary, is fraudulent against a purchaser by the 27 *Eliz.* (*Evelyn v. Templar*) Page 148
 [Covenant by a third person to indemnify husband against his wife's debts, a good consideration (*Compton v. Collinson*) 377]

W.

WILL.

Testator possessed of 7000*l.* navy bills, recites it, and gives them by the will: he had bills to a much larger amount at his death. *Quere*, What shall pass (*Pitt v. Jackson*) 51
 Marriage with a legatee is no revocation (*Ewbank v. Halliwell*) 220
 Words of desire, in a will, raise a trust (*Pearson v. Garnet*) 38: 226
 A woman, under a power, gave 300*l.* by a testamentary paper, to her husband; but so much as should be remaining at his death, to her brothers and sisters: the property is in the husband absolutely, the words, not being sufficiently certain, as to the property, to raise a trust (*Sprange v. Barnard*) 585
 Renewal of a prebendal lease, is an ademption of the gift; but a codicil to the will, though only to pass after-purchased estate, is a republication of the will, and the renewed lease shall pass under such republication (*Coppin v. Fernyhough*) 291
 See also *Powel v. Cleaver* 511
 Feme covert, under a power makes a will, afterwards, being discover, she takes a conveyance from the trustees to her own use; this is a revocation (*Lawrence v. Wallis*) 319
 The will of a single woman is revoked by her marriage (*Hodsdon v. Lloyd*) 534

WILL, *Proof of, per testes.*

It has never been laid down as a rule, that a will cannot be proved without examining all the witnesses, though the practice has been to examine all (*Powel v. Cleaver*) 504

WITNESS.

Motion that a witness be examined *de bene esse*, on affidavit that he was the only witness to a material fact, though no age was sworn to (*Hankin v. Middleditch*) 641

END OF THE SECOND VOLUME.







